IN THE

Supreme Court of the United States

October Term, 1966
No. 223

JESSE JAMES GILBERT,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Page

Miscellaneous

Textbooks

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QUESTIONS PRESENTED.

We submit that the primary questions presented for review (numbers 2 through 5, Petition for Certiorari, pp. 3-5; 384 U.S. pp. 985-986), may be phrased as follows:

1. Was petitioner Gilbert denied due process of law when his co-defendant's extrajudicial statements and testimony incriminating Gilbert were received in evidence (and were later found by the California Supreme Court to have been erroneously received), and when the trial court gave extensive admonitions to the jury limiting the consideration of the co-defendant's statements to the case of the co-defendant alone, and when the roles of Gilbert and the co-defendant could be readily distinguished, and the district attorney in

arguing to the jury discounted that portion of the co-defendant's statements to the effect that the co-defendant was under compulsion from Gilbert?

2. Was there an unreasonable search and seizure when officers, in fresh pursuit of a fleeing robber and killer, and following a lead from a wounded accomplice, entered Gilbert's locked apartment without a warrant of arrest or search, in his absence but with the intent of apprehending Gilbert or a confederate if he should be inside, and removed therefrom some small photographs of Gilbert, a reproduction of which was shown witnesses who later testified at the trial and identified Gilbert in the courtroom as a participant in the robbery; and the officers later took other objects from the apartment in connection with the issuance of search warrants?

3. Was Gilbert's right to the assistance of counsel violated by his being placed in a police lineup subsequent to his indictment when his counsel was not present, at which lineup Gilbert was required to exhibit himself and to speak for identification?

4. Was Gilbert's right to the assistance of counsel violated when he declined, in the absence of counsel, to discuss the offenses in question, following his arrest in Philadelphia, but later that same evening, after he was advised of his right not to say anything without advice from an attorney, he agreed to talk with an FBI agent about robberies in Philadelphia wherein a demand note was used, and in which discussion Gilbert voluntarily gave handwriting exemplars utilized in the present trial relative to a diagram of the scene of the robbery?

STATEMENT OF THE CASE.

A. Procedural Summary.

In an indictment returned March 10, 1964 by the Grand Jury of Los Angeles County petitioner Jesse James Gilbert and defendant Robin Charles King, Jr., were charged in Counts I and II with murdering George Davis and Edgar Ball Weaver, respectively, on or about January 3, 1964, and with being armed with a deadly weapon, a pistol, at the time of the commission of said offenses and at the time of arrest. [Cl. Tr. pp. 1-2.][1] The other counts pertained to the same date and contained the same charges of being armed. In Count III the defendants were charged with robbing the Mutual Savings & Loan Association of Alhambra of money in excess of $200. [Cl. Tr. p. 3.] In Counts IV through VII they were charged with kidnaping for purpose of robbery Victor J. Liechty, Sandy Butler, Nellie Riddle, and Bernice Thain, respectively. [Cl. Tr. pp. 4-7.]

Gilbert admitted the charges of two prior felony convictions, murder and burglary. [Cl. Tr. p. 227.]

Following pleas of not guilty, the defendants were tried before a jury. [Cl. Tr. pp. 17, 25.]

The defendants' motion for exclusion of witnesses was granted, excepting by stipulation the police investigating officer. [Cl. Tr. p. 25; see also Rep. Tr. p. 3360.]

The defendants were found guilty as charged with respect to all counts. They were found guilty of murder in the first degree as to Counts I and II, and robbery

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[1]The case is being heard on the typewritten record. "Cl. Tr." refers to the Clerk's Transcript thereof. "Rep. Tr." refers to the Reporter's Transcript thereof as it pertains to the trial in chief, which commences with Volume 6.

in the first degree as to Count III. As to the remaining counts they were found guilty of kidnaping for robbery without bodily harm. The charges of being armed were found true as to Gilbert and not true as to King. [Cl. Tr. pp. 143-44.]

After further proceedings the jury fixed the punishment as death for Gilbert on Counts I and II, and life imprisonment for King on Counts I and II. [Cl. Tr. p. 201.]

The defendants' motions for new trial were denied. Gilbert was sentenced to death on the murder counts and to imprisonment in the state prison for the term prescribed by law on the other counts. King was sentenced to life imprisonment on the murder counts and for the term prescribed by law as to the other counts. [Cl. Tr. pp. 227-29.]

King appealed from the judgment, and Gilbert's appeal was automatic. On December 15, 1965 the California Supreme Court reversed the judgment as to King and reversed the judgment as to Gilbert on Count II. In all other respects the judgments as to Gilbert were affirmed. Gilbert's petition for rehearing was denied February 9, 1966. (*People v. Gilbert*, 63 Cal. 2d 690, 696, 712, 717, 47 Cal. Rptr. 909, 912, 923, 408 P. 2d 365, 368, 379.)

On June 13, 1966, Gilbert's petition for certiorari was granted.

B. Factual Summary.

1. Circumstances Culminating in the Shootings.

Sandra Butler was employed as a senior teller at the Mutual Savings & Loan Association of Alhambra on January 3, 1964 when she heard a voice say, "Everybody freeze; this is a hold-up," at about 10:40 or 10:45 a.m. She turned around and faced petitioner Gilbert who made the statement. He had a gun in his hand. [Rep. Tr. pp. 43, 45-48, 69.] Gilbert threw at Miss Butler a brown paper grocery sack with the name Alpha Beta on it and told her to put money into it. Then he went upstairs. [Rep. Tr. pp. 64-65, 67.] Miss Butler and four other tellers placed their money in the bag. [Rep. Tr. pp. 68-69.] Miss Butler noticed a second man. Edgar Weaver, just inside the entrance to the building. He had a gun in his hand. [Rep. Tr. pp. 32, 80-81, 101.]

Victor Liechty was performing an audit, on the second floor of the building, when Gilbert entered the room, pointed a gun at him, told him to put down the telephone and directed him to come. Gilbert motioned him to go down the stairway and Mr. Liechty complied. [Rep. Tr. pp. 198-202.] Gilbert directed Mr. Liechty toward the vault area and told him to open the vault. Liechty opened the inner door of the large vault with a key which was nearby. Gilbert asked for money. Liechty told Gilbert that Miss Butler had the key to the money cabinet. Gilbert then called for Miss Butler. [Rep. Tr. pp. 203-05.]

Gilbert directed her to bring the keys. She took the keys and went to the vault. Gilbert told her to open the cash boxes but she told him there was no money in

them. Then Gilbert had her open the vault which contained money, consisting of rolled coins. He reached down and took a box from the vault and placed it on the top of the big vault. [Rep. Tr. pp. 85, 87-88, 95.] Gilbert ascertained that another employee, Nellie Riddle, had the key to a certain cash box in the vault. He called for Mrs. Riddle. [Rep. Tr. p. 96.]

In obedience to Gilbert's direction, Mrs. Riddle went back to the vault. Gilbert asked her to open certain locked compartments but she informed him there was no money in them. He asked her if she was certain and she assured him that she was. He then asked her, Miss Butler and Mr. Liechty if he (Gilbert) had all the cash in the vault and they assured him he did. Gilbert then directed them to leave the vault. He prodded Mrs. Riddle with his gun. [Rep. Tr. pp. 298-302.]

Miss Butler returned to her place at the teller's window. After leaving the vault area, Gilbert stopped near Miss Butler's window and set down the box containing money. He told Miss Butler to put the money into the Alpha Beta grocery bag. She started to do so. Gilbert then went to the first teller's window, opened the drawer for more money and threw it into the bag. [Rep. Tr. pp. 98-99.]

Altogether $11,492 was taken. [Rep. Tr. p. 315.]

As Gilbert was extracting money from the drawer Weaver called out, "Police." [Rep. Tr. pp. 212-13.] Police Sergeant George Davis, in uniform, came through the front door, armed with a gun, and ordered Weaver to put down his gun. Weaver hesitated and then threw his gun on a table. [Rep. Tr. pp. 213-14, 770, 1039.]

Bernice Thain, another employee of the bank, was in the area. Gilbert seized hold of Mrs. Thain's left arm from the rear and pushed her in front of him toward the door. Sergeant Davis moved slowly back. [Rep. Tr. pp. 111-12, 427.] Gilbert told Davis to put down Davis' gun or Gilbert would shoot the lady. Gilbert's pistol was pointed at Mrs. Thain's head. Davis said, "You will never shoot." Gilbert gave Mrs. Thain a push forward, then there was a shot followed by another shot and Sergeant Davis fell backward bleeding from his head. [Rep. Tr. pp. 428-30, 1016, 1046, 1048.] He died from a gunshot wound of the forehead. [Rep. Tr. pp. 18, 21.]

As Gilbert and Mrs. Thain were at the door, Weaver picked up his gun and went out of the building with them. After the shooting and after Sergeant Davis fell, Weaver and Gilbert ran off. [Rep. Tr. pp. 776, 1044, 1048-49.]

Summoned by radio to the scene, Alhambra Police Officer Billy Nixon stopped his police vehicle across from the bank. He drew his revolver as Sergeant Davis was backing through the entrance. [Rep. Tr. pp. 1038-40, 1048.] Just after Sergeant Davis was shot, Officer Nixon fired at the larger of the two robbers, *i.e.*, Weaver, and felt he hit Weaver. [Rep. Tr. pp. 1049-51.] Weaver flinched. [Rep. Tr. pp. 966-67.]

A businessman in the area saw the robbers running, then shortly afterward heard a crash similar to an automobile striking something. Then he saw an automobile emerge from a driveway near a parking area. [Rep. Tr. pp. 1004, 1017, 1022.] The businessman wrote the license number down on a slip of paper and gave it to Officer Nixon, advising him that the persons were in a

white Pontiac. [Rep. Tr. pp. 1023, 1054.] Nixon broadcast this information over his radio. As he drove he saw a group of people pointing north up Cordova. He proceeded north on Cordova one block where it deadended, then turned right until he came to Granada. [Rep. Tr. pp. 1055-56.] About half a block north of Main on Granada a man ran up to him. [Rep. Tr. pp. 1057-58.] The man asked Nixon if the officer was looking for two men that might be trying to get away from something. The man advised Nixon that two men had left a white Pontiac and entered a white 1957 Oldsmobile, then traveled north on Granada. [Rep. Tr. p. 1082.] Nixon communicated this information over the radio. [Rep. Tr. pp. 1076-77.] He drove north on Granada until he reached a point just south of Alhambra Road. There he observed a white Pontiac parked on the east side of the street. [Rep. Tr. p. 1062.] Its license corresponded with that on the slip of paper. [Rep. Tr. pp. 1062-63.] This automobile was stolen, having been parked early that morning by its owner in Hollywood. [Rep. Tr. pp. 414-16.] Beyond the Pontiac almost at the corner, Nixon saw a Chevrolet (possibly blue and green in color); it had run over the curb and into some trees. [Rep. Tr. pp. 1066, 1082.] Inside this automobile was Weaver, covered with blood and semi-conscious. A loaded gun was on the seat alongside him. [Rep. Tr. pp. 1068-69, 1074-75.] Officer Nixon associated Weaver with the happenings at the Savings and Loan; Weaver was similar in size to the man the officer believed he shot. [Rep. Tr. p. 1083.] Weaver was taken to the County General Hospital where he died that night as the result of a gunshot wound which penetrated his body from the rear. [Rep. Tr. pp. 32-35, 40.]

2. Rental of the Los Feliz Apartment.

Betty Willner was assistant manager of the apartment building at 3717 Los Feliz Boulevard, Los Angeles. On Thursday, January 2, 1964, Mrs. Willner rented apartment 28 to Gilbert. Gilbert used the name "Flood." Weaver was with him. [Rep. Tr. pp. 31, 1122-24, 1129.] On January 3, Mrs. Willner saw Gilbert between 11 a.m. and 12 noon. [Rep. Tr. pp. 1126, 1132.] Gilbert appeared to be alone. He asked for the key to his apartment, saying he had left his inside. [Rep. Tr. p. 1126.] About twenty minutes later he returned the key. About a half-hour later he came back and got it. In about a half-hour he returned the key to Mrs. Willner's mother. Mrs. Willner heard him tell her he was going to San Francisco and expected to be gone until Tuesday. [Rep. Tr. pp. 1127-29.] As Mrs. Willner recalled, the time Gilbert was last returning the key, her mother was talking to Dean Keil of the Federal Bureau of Investigation. [Rep. Tr. pp. 1130, 1136.]

3. Evidence Relative to the Search of the Los Feliz Apartment.

(The defendants and counsel stipulated that a closed hearing be held on the issue of whether the search of the Los Feliz apartment was legal, and the following matters were heard outside the presence of the jury. [Rep. Tr. pp. 1147-50.])

Mrs. Willner recalled that about a half-hour after she saw her mother talk to Keil, she (Mrs. Willner) admitted F.B.I. agents to apartment 28, *i.e.*, they took the key. [Rep. Tr. pp. 1151-52, 1156.] She pointed out the apartment to them and they opened the door. [Rep. Tr. pp. 1154-57.] The F.B.I. men told Mrs. Willner

to stand clear of the apartment to a place of safety. [Rep. Tr. pp. 1165-66.]

Dean Keil recalled that he arrived at the particular apartment building (the Los Feliz Lanai) about 1 p.m. January 3, having received a radio call to go to the area of Los Feliz Boulevard and Riverside Drive and look for an apartment with a Hawaiian sounding name. He had only a general description of Gilbert. [Rep. Tr. pp. 1172-74.] Mrs. Smith, the manager, was talking to a man, then the man left. Mrs. Smith informed Keil that Mr. Flood, one of the occupants of the apartment in question, No. 28, had just left stating he was going to San Francisco. Two other F.B.I. agents arrived, Schlatter and Onsgard, and the key to the apartment was given them. They went out and Mrs. Smith's daughter (*i.e.*, Mrs. Willner) went with them. [Rep. Tr. pp. 1176-77, 1180.] Around 1:25 p.m. or 1:30 p.m. Schlatter returned and gave Keil three or four small passport type photographs. [They were all identical to People's Ex. 46; Rep. Tr. pp. 1182, 1437-38.] Keil took these to the Savings & Loan Association in Alhambra, and turned them over to Special Agent La Jeunesse. [Rep. Tr. pp. 1181-83.]

A Special F.B.I. Agent, James Norton, heard about Weaver being at the hospital January 3, and proceeded there. He saw Officer Nixon, then talked to Weaver at about 11:50 a.m. [Rep. Tr. pp. 1202-03, 1205.] Weaver admitted he was in a robbery. [Rep. Tr. p. 1217.] Weaver gave the name "Skinny" Gilbert in response to questions about Weaver getting shot and who was with Weaver. Weaver said Gilbert was an escapee from Folsom. Norton called his office about 12:15 p.m. and relayed this information. [Rep. Tr. pp. 1206-07,

1209.] Later in the conversation Weaver referred to apartment No. 28 and its location (about two blocks from the corner of Riverside Drive and Los Feliz), with a Hawaiian sounding name, as the address of Gilbert. Another officer told Norton that Weaver said (while Norton was out of the room) that Gilbert was registered under the name of Flood. Norton called his office about 12:55 p.m. to relay the further information and the office gave him the name Jesse James Gilbert. Weaver confirmed to Norton that this was the correct name. [Rep. Tr. pp. 1208-10, 1220-21.] Weaver told Norton that no other person except himself and Gilbert was involved in the robbery. Norton did not know whether to believe this. In conversations with his office, his office had indicated the possibility of another person. [Rep. Tr. pp. 1221-23.]

Carl Schlatter, a Special Agent for the F.B.I. was instructed by radio to go to the Mutual Savings & Loan Association of Alhambra on the day in question, relative to a robbery and shooting, and he arrived at 12:40 p.m. [Rep. Tr. pp. 1236-38.] He was then directed to premises on Los Feliz Boulevard, indicated as the residence of one or both robbers. [Rep. Tr. p. 1240.] As he was driving there with another agent and two police officers, he was given the exact address and the full name of Gilbert. [Rep. Tr. pp. 1241-43, 1277.] The name Flood was also mentioned. [Rep. Tr. p. 1269.] He recalled Gilbert's name as a result of Gilbert being a suspect in bank robberies. To his knowledge Gilbert was wanted by the F.B.I. [Rep. Tr. pp. 1244-45.] En route he learned through a radio broadcast that three persons were apparently involved—the two men who were in the bank and a third in the getaway, that one

of the three was wounded and had wrecked a car and that the other two had gotten away in another car. Schlatter arrived at the premises about 1:05 p.m. [Rep. Tr. pp. 1246-47.] He talked to Keil and was advised that one of the occupants of apartment No. 28, Gilbert, had just left. (Keil may have mentioned the name Flood.) He went to the manager and received the key to that apartment. [Rep. Tr. pp. 1247-48, 1267, 1282. Neither he nor his associates had an arrest or search warrant; Rep. Tr. 1261-62.]

"Q. Now, when you [Schlatter] arrived there at the apartment and got this key, will you tell us what your state of mind was at that time in getting the key as to what you were going to do? A. Well, we knew from information previously received, there were three robbers. One was wounded and accounted for, one had just left a few minutes before, and there was a third one unaccounted for. Presumably he was in the apartment.

Q. Was there also in your mind that one of these robbers had shot a police officer? A. Very much so." [Rep. Tr. p. 1249.]

"Q. What was your intention when you took this key and started toward this particular apartment? A. Well, this in our parlance is a raid. We were going into a place presumably where a man is who had just participated in a bank robbery and it is our intention to take him into custody.

Q. Was it also in your mind that he might be armed? A. Very much so.

Q. Is it your opinion that that is good standard operating procedure for law enforcement where the law enforcing officers are in hot pursuit of such a criminal? A. Yes, that is our job.

Q. Did you believe yourself to be in hot pursuit of an individual in that apartment? A. Yes, I did." [Rep. Tr. p. 1250.]

[Schlatter also thought it possible that Gilbert had told the landlady he was going to San Francisco to throw them off the trail, and either might then be in the apartment or more possibly might come back in about a half hour; Rep. Tr. pp. 1280-81.]

Schlatter opened the door and went in with fellow officers. Their first concern was to see if someone was secreted in the place. Accordingly, they searched for a person or a hiding place for a person. They went into closets and looked under beds. In doing this, Schlatter saw several objects in open view. On a coffee table he saw a diagram on an open stenographic spiral notebook [People's Ex. 56; Rep. Tr. pp. 1379, 1441-42] depicting the area of the Savings & Loan Association in Alhambra. [Rep. Tr. pp. 1250-53.] He saw a paper bag with the marking of Alpha Beta markets on it. In the bag there appeared to be rolls of coins. He observed a clip from a .45 automatic. [Sergeant Davis was killed by a shot which could have been fired from a .45 automatic pistol; Rep. Tr. pp. 21-22, 1598.] He also observed a bowl full of money. [Rep. Tr. pp. 1254-55, 1257-58.]

A few minutes after entering the apartment, Agent Schlatter saw a photograph similar to People's Exhibit 46. It seemed to him that an agent had it in his hand; there were a number of photographs. Schlatter took them out of the apartment and gave them to Agent Keil as aforementioned. Schlatter instructed Keil to take one of them to the savings and loan and see if anyone there could recognize it. [Rep. Tr. pp. 1255-56.] Other than

these photographs, Schlatter removed nothing from the apartment and saw nothing else removed. About 10 or 15 minutes after Schlatter entered the apartment someone else there produced another photograph which was a "mug shot" containing a prison number. It seemed to him it had the name Gilbert on it; the group discussed the circumstance that it was of Jesse James Gilbert. It was compared with the one similar to People's Exhibit 46. [Rep. Tr. pp. 1259-60, 1266.]

Roger J. La Jeunesse, Jr., of the F.B.I., recalled that he received People's Exhibit 46 about 2:20 p.m. January 3, 1964 from Agent Keil who brought it to him at the Mutual Savings and Loan. La Jeunesse was supervising the interviewing of witnesses there. The photograph was enlarged and reproduced by means of a Polariod camera and the reproductions were made available to agents there and shown the witnesses present. [Rep. Tr. pp. 1287-92, 1298; see also, Rep. Tr. p. 1334.] [After People's Exhibit 46 was brought out to La Jeunesse, 11 photographs including 2 of Gilbert and one of Weaver were shown witnesses; Rep. Tr. pp. 2199-2200, 2215-16, 2224.]

With further reference to Agent Schlatter's entry into the apartment, "After we had searched for person or persons, and no one was there, it then became a matter of a stake-out under the assumption that the person or persons involved would come back." [Rep. Tr. p. 1258.]

Theodore Crowley, a Special Agent for the F.B.I., was also one of those who entered the apartment. [Rep. Tr. pp. 1300-01.]

"Q. At some time did you [Crowley] see a photograph—I show you exhibit 46. Did you at

that time see a photograph similar to that? A. Yes, sir.

Q. Now, was this photograph laying out visibly so that you saw it as you looked at it, or what was the situation in that regard? A. It was in a small envelope laying on top of a dresser in the bedroom of the apartment.

Q. All right.

Mr. Carr: I have here what looks like an envelope, your Honor, which has imprinted on the face of it 'Marlboro Photo Studio,' giving an address. May it be marked 46-B, your Honor?

...

Q. I show you 46-B. Does that appear to you to be the envelope or similar to the envelope that you saw? A. It appears to be the envelope.

Q. All right. Now, as to this envelope, from what you read on it and from its appearance, did it appear to you to be an envelope containing photos? A. Yes, sir, it did.

Q. As it lay there, could you see that there was something inside of it? A. Yes.

Q. To an extent? A. My impression was that it did contain something.

Q. All right. Where was this envelope when you saw it? A. On top of a dresser in the bedroom.

Q. All right. What did you then do with that envelope? A. I looked in it and saw that there were several copies of a photograph, which is the one I have just seen.

Q. All right. A. And immediately I took it to the living room area of the apartment where I

discussed it with a Mr. Onsgaard, Agent Onsgaard who was in charge in the building, and he instructed me to give it to another agent for him to utilize in pursuing the investigation, and I am reasonably certain that that agent was Mr. Schlatter." [Rep. Tr. pp. 1301-03.]

Crowley also observed the stenographer's spiral notebook and the writing on it. [Rep. Tr. p. 1305.] The diagram reflected the area surrounding the Savings & Loan Association in Alhambra. [Rep. Tr. p. 1306.] He also observed the clip for an automatic pistol, the bag, and rolls of coins in the bag after pushing the paper at the top aside. [Rep. Tr. pp. 1307-08, 1320.] The rolls of coins were found to have markings of the Mutual Savings & Loan Association on them. [Rep. Tr. pp. 1307, 1336.] [The markings were recognized by Miss Butler: Rep. Tr. pp. 93-94, 115-16.] He relayed information as to what had been found to the Los Angeles Office of the F.B.I. [Rep. Tr. p. 1309.] Between 4 and 5 p.m. he was advised that a search warrant had been issued for the apartment. After receiving that information he and other officers gathered material and began to make an inventory. [Rep. Tr. p. 1310.] The federal search warrant was sworn to by Special Agent Logan Lane and was for money and firearms. [Rep. Tr. p. 1311.]

When Crowley arrived, the apartment had already been searched for people; and the instructions he received were to look through the apartment for anything that could be used to identify or continue the pursuit of the particular person, without conducting a detailed search. [Rep. Tr. p. 1319.] En route to the apartment he was advised there was an outstanding warrant for

Gilbert's arrest for unlawful flight to avoid prosecution. [Rep. Tr. p. 1339.] [Gilbert was arrested in Philadelphia, Pennsylvania, February 26, 1964; Rep. Tr. p. 1335.]

Special Agent Lane who signed the affidavit for the search warrant was informed of the robbery and shooting, the involvement of Gilbert and Weaver, and the facts concerning the apartment. [Rep. Tr. pp. 1340-42, 1345-46.] The affidavit reflected Lane's belief that property and money had been concealed at the premises. [Rep. Tr. p. 1342.]

Frank Townsend, Special Agent for the F.B.I. was advised of the issuance of the search warrant between 4:30 and 5 p.m. January 3. [Rep. Tr. pp. 1356-57.] The warrant specified moneys and an ammunition clip. In compliance with the warrant, he took into his custody over $3,000.00, including the rolls of coins, and clip for an automatic. [Rep. Tr. pp. 1358-60.]

Townsend signed an affidavit for a second search warrant January 5, based on information at the premises. [Rep. Tr. pp. 1363-66.] In compliance with said second search warrant, Special F.B.I. Agent John Wallace took into custody on January 5 certain items of evidence found in the apartment, including the stenographic notebook. [Rep. Tr. pp. 1376-81.]

(Motions to suppress evidence on the ground that objects in the apartment were siezed in violation of the provisions against searches and seizure were denied. [Rep. Tr. pp. 1385-1408.])

4. Certain Evidence Pertaining to the Apartment.

F.B.I. Agents Norton [Rep. Tr. pp. 1412-15], Keil [Rep. Tr. pp. 1416-20], Schlatter [Rep. Tr. pp. 1422-

27], Crowley [Rep. Tr. pp. 1433-48], Townsend [Rep. Tr. pp. 1464-71], and Wallace [Rep. Tr. p. 1484], reiterated essential matters previously testified to on the issue of search and seizure, apart from hearsay.

Defendant King's fingerprint was found to be on the Alpha Beta paper sack [Rep. Tr. pp. 1490-91, 1499, 1502], and fingerprints of Gilbert and Weaver were found to be on various objects in the apartment; lifts were taken the late afternoon of January 3. [Rep. Tr. pp. 1543-45, 1632-37, 1649, 1653.]

5. Petitioner Gilbert's Arrest.

Irving Dean, Special Agent for the F.B.I., arrested Gilbert February 26, 1964 in Philadelphia, Pennsylvania, around 9 p.m. Gilbert was armed with a loaded .45 automatic. [Rep. Tr. pp. 1548-51, 1860.] Gilbert was advised of his rights to an attorney, that he did not have to make any statements and that any statement he made could be used against him in court. Thereafter he said, "I wish you people had shot me because I am dead anyway," and "All bank robbers should be in jail." Initially, he identified himself by a different name. He was transported downtown from the scene of the arrest, about three miles. [Rep. Tr. pp. 1575-76.] At F.B.I. headquarters he was asked if he knew a police officer had been killed. He said he heard it on his radio two or three days afterward and also that he was being sought for the killing. When asked, he said he did not know that a person by the name of Weaver had been killed in a bank robbery in Alhambra. [Rep. Tr. pp. 1577-78.] He refused to discuss his activities on either the east or west coast, indicating he wanted to obtain counsel before making any statements. [Rep. Tr. p. 1675.]

6. Evidence on Admissibility of Handwriting Specimens, Outside the Presence of the Jury [See Rep. Tr. p. 1829].

James Shanahan, Special Agent for the F.B.I. had a conversation with Gilbert in Philadelphia later that same evening, February 26 at 10 p.m. [Rep. Tr. pp. 1823-24, 1830.]

Initially, Shanahan advised Gilbert that he did not have to make any statement whatsoever to Shanahan without the advice of an attorney and that any statement he made could be used against him in a court of law; Shanahan made no promises or threats to induce Gilbert to make a statement. [Rep. Tr. p. 1836.] Gilbert gave Shanahan no indication that he (Gilbert) did not want to say or do anything until he had consulted a lawyer. [Rep. Tr. p. 1833.]

> "A. . . . I [Shanahan] asked him if he would like to talk to me, you know, and he said he would providing it didn't pertain to the case here in California, that he would agree to talk to me, so I interviewed him on that basis, that I wouldn't talk about the California case. I just wanted to talk to him about the cases that we were interested in in Philadelphia.
>
> . . .
>
> "Q. Is it your testimony, sir, that you had absolutely no information that these hand samplers were to be used subsequently in Los Angeles, California? A. No, sir. The case that involved the hand printed note was my case in Philadelphia and that was my interest in it, you see." [Rep. Tr. pp. 1833-34.]

Shanahan indicated to Gilbert that he suspected him of some robberies in Philadelphia. There had been a series of robberies, and Shanahan was one of those working on them; they involved the use of a demand note. Shanahan asked Gilbert if Gilbert would give Shanahan some samples of his handprinting and Gilbert agreed that he would. [Rep. Tr. pp. 1830-32.] Shanahan did not assure Gilbert that the handwriting samplers would not be used in any way other than to clear up the alleged involvements in the Philadelphia robberies. [Rep. Tr. p. 1835.] Gilbert made the specimens of handprinting for Shanahan freely and volutarily. No promises of reward or immunity were extended Gilbert and no duress or undue influence was used on him. [Rep. Tr. pp. 1836-37.]

It was F.B.I. policy to secure samples of handprinting of all suspects in bank robberies to compare with samples on file in Washington of bank robberies throughout the country. These samples of handprinting were also kept for further reference as specimens of the handwriting of the individual. It was in the same category as taking fingerprints and keeping the fingerprints on file. [Rep. Tr. p. 1839.]

Gilbert testified on the issue, relating that in the conversation with Shanahan he told Shanahan that he (Gilbert) did not wish to talk about the robberies on the West Coast unless he had counsel present, but that if the matter only involved Philadelphia, he would be glad to cooperate inasmuch as he did not want someone who was guilty to get away [Rep. Tr. pp. 1843-44]; that Shanahan told Gilbert that the matter only involved Philadelphia and that the person in question had attempted to rob financial institutions twice by means of notes. [Rep. Tr. pp. 1844-45.]

Shanahan testified further. He denied that Gilbert told him he did not want to talk about robberies on the West Coast unless he had an attorney present. Gilbert merely said that he did not want to discuss the robberies on the West Coast and that was the reason he would agree to be interviewed by Shanahan. Shanahan did not question Gilbert concerning robberies on the West Coast. Gilbert made no statement that the reason he wanted to talk about the Philadelphia robberies was because he did not want someone guilty to get away, nor did Shanahan tell Gilbert that Shanahan's only interest was robberies around Philadelphia, on the east coast. [Rep. Tr. pp. 1849-50.]

(The court ruled that the writings were given voluntarily and were admissible. [Rep. Tr. p. 1852.])

7. Evidence of Handwriting Specimens, in the Presence of the Jury.

FBI Agent Shanahan related that Gilbert made the samples of handprinting in Shanahan's presence denoted People's Exhibits 74-A through H. [Rep. Tr. pp. 1858-1859, 2345 (74-B not received).] People's Exhibit 75 [Rep. Tr. pp. 1863, 2346] was an exemplar card in the name of Gilbert. [Rep. Tr. pp. 1861-63.] It had been filled out at the Long Beach Police Department January 27, 1960, in the customary procedure following booking. [Rep. Tr. pp. 1874, 1878-83.] An examiner of questioned documents had the qualified opinion that the person who wrote the People's Exhibit 74 series and also People's Exhibit 75 made certain writings on the stenographer's noetbook aforementioned denoted People's Exhit 56. [Rep. Tr. pp. 1890-92.] [Reference was had to the diagram thereon; Rep. Tr. p. 1922.]

8. Defendant King's Statements to the Authorities.

To paraphrase the opinion of the California Supreme Court (63 Cal. 2d at pp. 698-99, 47 Cal. Rptr. at pp. 913-14, 408 P. 2d at pp. 369-70), relative to the testimony of King's statements to the authorities, King related that he met Weaver at a parole meeting. Although he declined to help Weaver rob a "bookie joint" King subsequently accepted Weaver's offer of a hundred dollars to steal an automobile. On the morning of January 3, 1964, King stole a Pontiac automobile and drove it to Los Feliz and San Fernando Road. A friend ("Ralph") followed in King's own white Oldsmobile. Gilbert and Weaver arrived in a green Chevrolet at 10:00 a.m. and King and his friend followed them to Alhambra. Gilbert and Weaver parked the Chevrolet and took the stolen automobile. For a thousand dollars King agreed to wait for them and to drive Gilbert back to his apartment in Glendale. [Rep. Tr. pp. 1940-41, 1950-51, 1963.]

After dropping his friend off at a bowling alley, King waited for Gilbert and Weaver. When they returned, Weaver, who was bleeding badly, approached the green automobile and Gilbert got into King's automobile with a paper sack which appeared to be full of money. Gilbert put a .45 automatic pistol against King's stomach and said he would kill him unless he did what he was told. [Rep. Tr. pp. 1952-53, 1963.]

King drove to Gilbert's apartment. En route Gilbert told King that he and Weaver had robbed a bank. Gilbert said when a policeman entered the bank he used a woman hostage and forced the policeman to back out the door. He shot the policeman and fired two quick shots at a police car he observed parking. Gilbert said

that he thought Weaver had got in his line of fire and that he had accidentally shot Weaver. He also said "I have killed one cop today, and I will kill a lot more before I am through." [Rep. Tr. pp. 1953-56.]

When they arrived at the apartment, King waited with the paper sack while Gilbert obtained a key from the manager. After Gilbert changed to other clothing, he offered King a thousand dollars to drive him to Salt Lake City. King refused. Then Gilbert came toward him holding a pillow. King heard a click and realized that a gun under the pillow had misfired. He begged for his life and after a few moments Gilbert told King to relax, he was not going to kill him. Gilbert gave King $1300, then they left the apartment. King waited as Gilbert returned the key to the manager. They drove to an alley where Gilbert threw the automatic into a trash can. They proceeded to a bar where shortly afterward Gilbert met a woman friend and allowed King to leave. [Rep. Tr. pp. 1957-61.]

The testimony of King's statements, summarized above, was presented near the close of the bulk of the People's testimony. [See Rep. Tr. p. 2102.] Some additional testimony was presented relative to statements outside Gilbert's presence. On several occasions, the court admonished the jurors that they should not consider such testimony with respect to Gilbert. [Rep. Tr. pp. 1939, 1967-68, 2131, 2292, 2317; see also Rep. Tr. p. 2764.] In instructing the jury, the court stated that where evidence was received against one defendant but not as against another it could only be considered as against the defendant against whom it was permitted to be received. [Cl. Tr. p. 73; see also Cl. Tr. p. 195, Penalty Phase.]

9. Nature of the Defense.

Gilbert did not testify on the issue of guilt. He presented several witnesses who testified substantially to photographic matters including what pictures were shown witnesses at the savings and loan. [Rep. Tr. pp. 2103-17, 2188-95, 2197-2201.] As reflected in a discussion between court and counsel [Rep. Tr. p. 2207], one purpose of the defense was to indicate that certain things could not have been observed from where a witness was located at the savings and loan.

King took the stand and testified generally as in his statements summarized above. [Rep. Tr. p. 2366 *et seq.* especially Rep. Tr. pp. 2382-2415.]

The California Supreme Court noted that King's testimony was less damaging to Gilbert than King's statements (63 Cal. 2d at p. 702, 47 Cal. Rptr. at p. 916, 408 P. 2d at p. 372). In that connection, it may be observed that during the testimony of King's statements Gilbert was reported to have said that he would kill many more policemen before he was through, with reference to his having done some shooting. [Rep. Tr. pp. 1953-56.] When King was asked at the trial if Gilbert said anything as to what he had done relative to shooting, King did not repeat that portion of the statement as to killing many more policemen. [Rep. Tr. p. 2399; see also Rep. Tr. pp. 2641, 2643, 2675, 2721.]

The court instructed the jury that if King was found to be an accomplice in any of the crimes charged, his testimony must be corroborated as against Gilbert, and that his testimony as against Gilbert should be viewed with distrust. [Cl. Tr. p. 104.] Said instruction was reread in substance to the jury during the course of their deliberations and the court indicated it would be sent in with the jury. [Rep. Tr. p. 3299-A.]

10. Nature of the Penalty Phase.

To paraphrase the opinion of the California Supreme Court (63 Cal. 2d at p. 702, 47 Cal. Rptr. at p. 916, 408 P. 2d at p. 372), most of the People's evidence at the penalty phase of the trial was introduced to show facts in aggravation of Gilbert's penalty. This evidence disclosed that Gilbert was convicted in 1947 of second degree murder on a plea of guilty for killing a fellow prisoner while serving a term in San Quentin. [Rep. Tr. pp. 3703-04, 3713-16, 3843-44.] In 1959 he was released on parole and was convicted of burglary the following year. [Rep. Tr. pp. 3685-86, 3910-15, 3935.] In July 1963 he escaped from prison [Rep. Tr. pp. 3564-67, 3570], and committed a series of armed bank robberies, October 28, 1963 [Rep. Tr. pp. 3361-62, 3367-68], December 6, 1963 [Rep. Tr. pp. 3317, 3320, 3356-57], December 20, 1963 [Rep. Tr. pp. 3460, 3469-70], December 23, 1963 [Rep. Tr. pp. 3491, 3494-95, 3543], and December 31, 1963. [Rep. Tr. pp. 3736, 3743, 3754.]

Gilbert took the stand during the penalty phase. He explained that he acted defensively in the episode at San Quentin which resulted in his being charged with the murder of a fellow prisoner. [Rep. Tr. pp. 3947-48, 3957-58, 3960.] He denied committing the offenses charged in the case at bar, maintaining he was elsewhere. [Rep. Tr. pp. 3963-65.]

11. Particulars of the Eye Witness Identification Testimony at the Guilt and Penalty Phases.

The eye witness identification testimony was substantial. Seven witnesses testifying on the guilt phase in June, 1964 [Cl. Tr. pp. 25-28, 30], identified Gilbert in the courtroom as a participant in the robbery at the

Mutual Savings and Loan. [Butler, Rep. Tr. p. 48; Liechty, Rep. Tr. p. 202; Riddle, Rep. Tr. p. 286; Schuett, Rep. Tr. p. 455; Clark, Rep. Tr. p. 548; Horn, Rep. Tr. pp. 778-79; Espinosa, Rep. Tr. pp. 871, 874.]

The testimony of each of these identification eye witnesses reflected a definite opportunity on his or her part to observe Gilbert. [See Butler, Rep. Tr. pp. 45, 48, 64, 66, 128, 131; Liechty, Rep. Tr. pp. 201-02, 204, 206, 208, 264; Riddle, Rep. Tr. pp. 284-86, 293-95, 299-301, 305, 307, 309, 312, 329, 343, 391; Schuett, Rep. Tr. pp. 455-61, 463, 481, 510-11; Clark, Rep. Tr. pp. 548-53, 557; Horn, Rep. Tr. pp. 767, 772-76, 778, 787-91, 793-94, 796, 808; Espinosa, Rep. Tr. pp. 850-52, 854, 861-62, 870-71, 874, 879, 905.]

In the guilt phase there was no questioning of identification witnesses relative to photographs or the lineup until cross-examination. [See Butler, Rep. Tr. p. 141; Liechty, Rep. Tr. p. 233; Riddle, Rep. Tr. p. 349; Schuett, Rep. Tr. p. 485; Clark, Rep. Tr. p. 560; Horn, Rep. Tr. p. 803; Espinosa, Rep. Tr. p. 912.] It is submitted that the people were relying on the in-court identifications; and that there was ample opportunity to cross-examine the various witnesses relative to their identifications.

The testimony of Miss Butler is significant in connection with the procedures followed. She was shown a number of photographs the afternoon of the robbery. The authorities did not indicate that one of the photographs was that of the person they suspected of committing the offense. They just asked her to look at the pictures they had. [Rep. Tr. p. 145.] She was shown about five photographs in the first group of pictures that day about an hour and a half after the robbery.

They were little photographs. She saw in that group one of Gilbert and one of Weaver. [Rep. Tr. pp. 176-78.] The second group was shown her around 2:00 or 3:00 p.m. There were about ten in that group. She recognized in that group Gilbert's photograph and Weaver's. [Rep. Tr. pp. 178-80.] In no instance did any of the persons showing the photographs indicate which one or ones he wanted her to identify. [Rep. Tr. p. 180.] As she recalled the pictures in each group were the same size. [Rep. Tr. p. 187.]

She attended the lineup at the police building March 26, 1964. [Rep. Tr. pp. 142-43.] She was at the police building around 7:00 p.m. and was in an auditorium. There could have been a hundred people in the audience. She would say that eight or ten Caucasian men were brought in in a line. Questions were asked them and when they were asked to speak or answer they would be required to step forward. [Rep. Tr. pp. 147-50.] Some were asked when or where he was arrested and did he own an automoblie. Some were asked to describe the automobile. Gilbert was in the lineup. [Rep. Tr. pp. 150-52.] The men were on a stage. The lighting was bright on the stage and dark in the audience. Light was reflecting into the eyes of the people in the lineup; it would have been very difficult for them to look out into the audience. [Rep. Tr. p. 152.] Miss Butler was in the fifth row about 43 feet from the stage. [Rep. Tr. p. 153.] A moderator asked the questions. [Rep. Tr. pp. 156-57.] The men all left the stage together. [Rep. Tr. p. 161.] At the lineup no one told Miss Butler that Gilbert was No. 4 nor whom to identify of that group. [Rep. Tr. pp. 183-84.] She did not remember that the men were asked to identify themselves

by name. She did not recall hearing Gilbert mentioned by name there. [Rep. Tr. p. 188.]

During discussion on a motion to strike Miss Butler's testimony, the court made these observations:

> ". . . I am saying that she comes into the courtroom here, regardless if you hadn't any show-up here at all, she comes into the courtroom here and positively identifies this defendant." [Rep. Tr. p. 193.]
>
> "I would think, if I were in the robbery she was in, I would think I would have a pretty good idea who did it when I saw him in the courtroom, and I think she has." [Rep. Tr. p. 194.]

Mr. Liechty's testimony reflected essentially the same procedures in regard to photographs, *i.e.*, he was shown two groups the day of the robbery. The first group was around noon. They were different sizes. He selected a photograph of Gilbert from each group. [Rep. Tr. pp. 233-37.] He testified at a removal proceeding in Philadelphia March 11, 1964, and recognized Gilbert when he walked in the courtroom. [Rep. Tr. pp. 219-20, 278-79.]

Mrs. Riddle testified with respect to viewing the photographs that she was shown them about 4:00 p.m. the day of the robbery. [Rep. Tr. p. 337.] There were about 25 or 30 of various sizes. She recognized 2 or 3 as being of Gilbert. [Rep. Tr. p. 388.] No particular picture was designated to her. [Rep. Tr. p. 389.] Her testimony relative to the lineup tied in basically with that of Miss Butler. [Rep. Tr. pp. 349, 352-58.]

Miss Schuett saw photographs but did not make any positive identification. [Rep. Tr. p. 489.] She did not attend the lineup. [Rep. Tr. p. 490.]

Mr. Clark looked at photographs before noon the day of the robbery. He could not remember relative to looking at the photographs in the afternoon. He selected one photograph of Gilbert. [Rep. Tr. pp. 560-63.] He attended the proceedings in Philadelphia where he saw Gilbert in the courtroom; he also observed a photograph of Gilbert lying on the desk. [Rep. Tr. pp. 565-66, 590-91.]

Mr. Clark's testimony relative to the lineup tied in with that of Miss Butler. He related that he saw about 10 men at the lineup. He did not do anything before he went in the police building nor go any place before he entered the auditorium. The auditorium was darkened and light shone on the people on the stage. [Rep. Tr. pp. 566, 568.] The persons on the stage would be asked by an officer or moderator questions of this nature: "When were you arrested?" "Do you own an automobile?" "What is the make of your automobile?" [Rep. Tr. p. 571.] The men in the lineup were Caucasians. There were differences in ages and clothing of those Mr. Clark remembered. As Mr. Clark recalled, Gilbert was No. 7. As to whether any person removed any clothing, Mr. Clark recalled that one man, possibly No. 5, removed a jacket. [Rep. Tr. pp. 572-75, 577-78.]

Mrs. Horn saw photographs but did not identify a picture of Gilbert. She did not see Gilbert at any time from the robbery until she got into court. [Rep. Tr. p. 803.]

Mr. Espinosa related that the day of the robbery an officer showed some pictures at the witness' home; there were two of different men. One was a photographic sketch. As Mr. Espinosa recalled, he identified

a picture then of the other man involved. He was not positive as to the remaining picture. Subsequently, at school an officer showed him a picture which he identified as Gilbert's. [Rep. Tr. pp. 911-15.] He did not go to the lineup; he had not seen Gilbert from the time of the robbery until the day he (witness) was testifying. [Rep. Tr. p. 918.]

Of the preceding witnesses, the following appeared before the grand jury March 5, 1964: Butler [Rep. Tr. pp. 165, 185], Liechty [Rep. Tr. p. 258], Riddle [Rep. Tr. p. 348], and Clark [Rep. Tr. p. 563]. A photograph (or reproduction of one) which came from Gilbert's apartment was used at the grand jury. [Rep. Tr. pp. 378, 380-83.]

Eight witnesses testifying on the penalty phase in July, 1964 [Cl. Tr. pp. 165-67], identified Gilbert in the courtroom as a participant in various other robberies all prior to the Mutual Savings and Loan as aforenoted: [Mumblo, Rep. Tr. p. 3320; Asbury, Rep. Tr. pp. 3356-57; Pesqueira, Rep. Tr. pp. 3367-68; Waide, Rep. Tr. pp. 3469-70; Eoff, Rep. Tr. pp. 3494-95; St. Amant, Rep. Tr. p. 3543; Pingleton, Rep. Tr. p. 3743; Ramos, Rep. Tr. p. 3754.]

The testimony of each of these witnesses reflected a definite opportunity on his or her part to observe Gilbert. [See Mumblo, Rep. Tr. pp. 3319-23, 3421-25, 3427, 3431-32; Asbury, Rep. Tr. pp. 3356-57, 3435-41; Pesqueira, Rep. Tr. pp. 3363-68, 3381-86, 3388; Waide, Rep. Tr. pp. 3463, 3466-70, 3475-76, 3481; Eoff, Rep. Tr. pp. 3494-99, 3520-26; 3529-32; St. Amant, Rep. Tr. pp. 3542-46, 3557-60, 3562; Pingleton, Rep. Tr. pp. 3739-40, 3742-43, 3747; Ramos, Rep. Tr. pp. 3752-55, 3761.]

In the penalty phase, while there was reference to photographs and the lineup during direct examination, it was not until after the witnesses identified Gilbert in the courtroom. [See, Mumblo, Rep. Tr. p. 3330; Asbury, Rep. Tr. pp. 3358-59; Pesqueira, Rep. Tr. p. 3375; Waide, Rep. Tr. p. 3471; Eoff, Rep. Tr. p. 3501; St. Amant, Rep. Tr. p. 3549; Pingleton, Rep. Tr. p. 3743; Ramos, Rep. Tr. p. 3757.] It is submitted that the People were relying on the in-court identifications; and that there was ample opportunity to cross-examine the various witnesses relative to their identifications.

Relative to photographs, Mrs. Mumblo related that the authorities showed her some following the robbery at which she was present. She saw none that resembled Gilbert. At a later time she did. [Rep. Tr. pp. 3330-31.]

Mr. Asbury was shown photographs the same day as the robbery at which he was present. He was shown photographs about half a dozen times. He would be shown a number each time. [Rep. Tr. pp. 3357-58.] He did not recall making a photographic identification the day of the robbery. [Rep. Tr. p. 3451.] Around the middle of January 1964, he was shown a group of about 10 photographs. He identified some of Gilbert. [Rep. Tr. pp. 3451-54.]

The second day following the robbery at which she was present, Mrs. Pesqueira was shown a group of photographs. She was shown photographs again about six weeks prior to her testifying. [She was testifying July 21, 1964; Rep. Tr. p. 3300.] In the first group she saw none that resembled Gilbert. In the second group she did see one or more that resembled him.

[Rep. Tr. pp. 3375-77.] There may have been another time when she saw some photographs (*i.e.*, between the aforementioned times). On that occasion she identified one of Gilbert. [Rep. Tr. pp. 3400-02.]

Mrs. Waide was shown photographs subsequent to the robbery at which she was present. The pictures were always in groups. [Rep. Tr. pp. 3471-73.] After hearing of the savings and loan robbery in Alhambra, she saw Gilbert's picture on television; this was before she saw any mug shots or anything. [Rep. Tr. p. 3484.] On an occasion subsequently, she recognized two photographs of Gilbert from among 8 or 10. [Rep. Tr. pp. 3485-86.]

Mrs. Eoff was shown photographs and they would be in groups. She did not recall seeing Gilbert's photograph until after the Alhambra robbery, then she was shown some photographs in the group of Gilbert and the other two men with him (relative to the robbery at which she was present) and singular ones of Gilbert. [Rep. Tr. pp. 3501, 3506-08.]

Mr. St. Amant was initially shown photographs the first week in January, 1964. He was shown photographs 10 or 15 times and always in groups. On some occasions he saw a photo that resembled Gilbert. [Rep. Tr. pp. 3548-49.]

The day of the robbery at which he was present or a couple of days later, Mr. Pingleton was shown about four or five photographs of three different men. He noticed one of Gilbert. Thereafter he was shown additional photographs. There were three times altogether. The photographs were always in groups. On each occasion he noticed a photograph of Gilbert. [Rep. Tr. pp. 3743-44, 3748.]

Miss Ramos was shown at least five photographs the same day of the robbery at which she was present. Two were of Gilbert. She was shown photographs three times and in groups, and on each occasion she recognized one of Gilbert. [Rep. Tr. pp. 3755-56.]

The foregoing witnesses attended the lineup and observed Gilbert there. [Mumblo, Rep. Tr. pp. 3330-31; Asbury, Rep. Tr. pp. 3358, 3450; Pesqueira, Rep. Tr. pp. 3376-77; Waide, Rep. Tr. pp. 3471-73; Eoff, Rep. Tr. pp. 3509-10, 3512; St. Amant, Rep. Tr. pp. 3549-50; Pingleton, Rep. Tr. pp. 3744-45; Ramos, Rep. Tr. p. 3757.]

SUMMARY OF ARGUMENT.

A. Relative to King's statements implicating Gilbert (which the California Supreme Court, in advance of *Miranda v. Arizona*, 384 U.S. 436 (1966), found to be erroneously admitted), it may be observed that Gilbert and King had separate counsel at the trial and that no request for separate trials appears prior to the presentation of testimony. In arguing to the jury, the prosecuting attorney discounted King's story of being under any compulsion from acts of Gilbert. In his own testimony King acknowledged that he had the objective of pointing the finger of guilt at Gilbert and of relieving himself of as much onus as possible. Under such circumstances the jurors could easily differentiate between the gradations in evidence as to Gilbert and King, with appropriate instructions from the trial court. The trial court extensively admonished the jurors to limit testimony of King's statements to King's case alone. While King repeated much of his statements in his testimony, the court instructed the jury that as against

Gilbert, King's testimony must be corroborated and that it should be viewed with distrust. It is submitted that the factors found to provide the petitioner with adequate protection in *Delli Paoli v. United States,* 352 U.S. 232, 239 (1957) were present here, and in view of the massive evidence of guilt as to Gilbert no fundamental unfairness is shown from the admission of King's statements and testimony.

B. Relative to the officers' entering Gilbert's locked apartment in his absence, without a warrant of arrest or search, they were in fresh pursuit of a robber and killer. The wounded accomplice, Weaver, gave the officers a good lead. He named Gilbert and indicated Gilbert's address. The information as to the address was borne out. Since Gilbert had recently shot a police officer and fled the scene of the shooting still armed, the officers were justified in entering the premises where he resided, without demand or explanation (for the officers' peril might otherwise be increased; see *Ker v. California,* 374 U.S. 23, 39-41 (1963)), to arrest him or a confederate who might be therein. The F.B.I. had reason to believe three persons were involved in the offenses, and at least one might then be in the apartment. When the officers entered the apartment they searched for a person or hiding place for a person. Several objects were observed in plain view, including a small envelope with the name of a photo studio on it, which appeared to and in fact did contain photos. These photos (of Gilbert) were copies and were compared with a mug shot. It was appropriate to take these photos, to assist with identification (see *Caldwell v. United States,* 338 F. 2d 385, 387 (8th Cir. 1964), cert. denied 380 U.S. 984 (1965)), and have a reproduction shown witnesses

at the scene. The reproduction could very well confirm or disprove the validity of Weaver's lead and point the direction in which the officers should concentrate their energies to apprehend the escaped robber and killer. Further it is submitted that the relationship between the photographs and the impressive eye-witness testimony in the courtroom was so attenuated no fundamental unfairness is demonstrated. What the officers observed after entering the apartment justified their subsequently taking other objects in connection with the issuance of search warrants.

C. Relative to the absence of counsel at the police lineup, it must first be inquired whether the use of a lineup like the one in the case at bar is akin to the use of a defendant's own incriminating words. Historically and practically a lineup is not so akin (see *Schmerber v. California*, 384 U.S. 757, 763-764 (1966)), where as here it is used for identification purposes solely; *i.e.*, the suspect is required to exhibit himself and to speak for identification, and what he says is not used against him at the trial. The right to the assistance of counsel (see *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964)) is basically designed to safeguard the individual's privilege against self-incrimination. It is submitted that the individual is not entitled to have counsel present during identification activities such as the lineup here, which are not designed to elicit information from him to be used against him at the trial. (Thus, the circumstance that the lineup took place subsequent to the indictment is immaterial.) It is further submitted that a causal nexus is lacking between the lineup and the subsequent testimony of eye-witnesses, so that no fundamental unfairness is demonstrated in any event.

D. Relative to the absence of counsel when the handwriting exemplars were given, it may again be noted that the right to the assistance of counsel is basically designed to safeguard the individual's privilege against self-incrimination. The procurement of handwriting exemplars as in the case at bar is not akin to eliciting an essentially testimonial response. When an individual writes for identification, the privilege against self-incrimination does not inhere (see *Schmerber v. California,* 384 U.S. 757, 764), accordingly the right to the assistance of counsel is not violated. It may be observed that Gilbert nevertheless was advised of his right to counsel relative to making statements prior to his giving the exemplars. Following his arrest, Gilbert declined to talk about the offenses in question until he had the advice of counsel. Later that evening an F.B.I. agent informed Gilbert of his right not to say anything without advice from an attorney. Gilbert agreed to talk about robberies in Philadelphia in which a demand note had been used. On request, Gilbert voluntarily wrote the exemplars; the F.B.I. agent obtained them for the purpose of investigating the Philadelphia robberies. No deception or coercion is shown. Moreover, considering the massive evidence of guilt (and the fact that a handwriting specimen in Gilbert's name other than those in question was also used in comparison, relative to a diagram of the robbery scene), it is submitted that no fundamental unfairness is shown.

ARGUMENT.

I.

No Unfairness Resulted as to Gilbert From the Admission of King's Statements and Testimony, the Limiting Instructions Being Clear and Explicit.

It is urged that petitioner Gilbert's right to due process was violated by the introduction into evidence of defendant King's statements to the authorities and by King's testimony at the guilt phase of the trial. It is pointed out that King not merely incriminated himself but implicated Gilbert. (Brief for Petitioner, Argument, Point I.)

At the outset it may be observed that Gilbert and King had separate counsel at the trial and that no request for separate trials appears prior to the presentation of testimony. [Cl. Tr. pp. 11-25.]

It will be recalled, from the testimony of King's statements to the authorities, that King related his having stolen an automobile at Weaver's behest, and that he waited for Gilbert and Weaver (Statement of the case, *supra*, B, (8); [Rep. Tr. pp. 1940-41, 1950-51, 1963]); that after he returned with the wounded Weaver, Gilbert pointed a pistol against King's stomach and threatened to kill him unless he did what he was told [Rep. Tr. pp. 1952-53, 1963]; that Gilbert informed King of his killing a policeman and said he would kill a lot more before he was through [Rep. Tr. pp. 1953-56]; that when they were in the apartment Gilbert came toward King with a pillow, King heard a click and realized that a gun held underneath it had misfired; that King begged for his life and Gilbert told him he was not going to kill him and gave him

some money. [Rep. Tr. pp. 1957-61.] This testimony was presented near the close of the bulk of the People's testimony on the guilt phase. [See Rep. Tr. p. 2102.]

King took the stand at the guilt phase and testified generally as in his statements [see Rep. Tr. pp. 2382-2415]; however, as the California Supreme Court noted (63 Cal. 2d at p. 702, 47 Cal. Rptr. at p. 916, 408 P. 2d at p. 372), King's testimony was less damaging to Gilbert than King's statements. When King was asked at the trial if Gilbert said anything as to what he had done relative to shooting, King did not repeat that part of the statement as to killing many more policemen. [Rep. Tr. p. 2399; see also, Rep. Tr. pp. 2641-2643, 2675, 2721.]

In his argument to the jury on the guilt phase, the prosecuting attorney strongly discounted King's story of being under any compulsion from acts of Gilbert. [Rep. Tr. pp. 2971, 2973, 2975-82, 3220-21, 3225.] In fact, King acknowledged in his own testimony that he had the objective of pointing the finger of guilt at Gilbert and of relieving himself of as much onus as possible. [Rep. Tr. pp. 2775-76.]

In this posture of the case, we submit that the jurors could easily differentiate between the gradations in evidence as to Gilbert and King, under appropriate instructions. For example, Gilbert was overwhelmingly incriminated by the eye-witness testimony placing him at the scene of the savings and loan as a participant. (Statement of the Case, B, (11).) King's role emerged as that of an aider and abettor removed from the scene. The jury might well consider it likely that King was seeking to do just what he acknowledged in his testimony: point the finger of guilt at Gilbert and relieve himself of responsibility as much as possible.

The jurors would accordingly be receptive to instructions from the court that they should not consider King's statements to the authorities as against Gilbert and that they should view with distrust King's testimony implicating Gilbert.

Petitioner specifies that portion of the California Supreme Court's opinion indicative of error (but error short of prejudice) as to Gilbert from the admission of King's testimony. (63 Cal. 2d at pp. 701-702, 47 Cal. Rptr. at pp. 915-16, 408 P. 2d at pp. 371-72.) The California Supreme Court therein cited its previous decision in *People v. Aranda,* 63 Cal. 2d 518, 526-27, 47 Cal. Rptr. 353, 358, 407 P. 2d 265, 270 (1965), which held that while limiting instructions did not eliminate error as to one co-defendant when another co-defendant's confession implicating the former was erroneously admitted, ". . . The giving of such instructions, however, and the fact that the confession is only an accusation against the nondeclarant and thus lacks the shattering impact of a self-incriminatory statement by him . . . preclude holding that the error of admitting the confession is always prejudicial to the nondeclarant." (*Aranda* articulated judicially declared rules of practice for trial courts thenceforth to follow in California; *e.g.,* that if references implicating a co-defendant could not be effectively deleted from another co-defendant's extrajudicial statements, there should be a severance of trials or exclusion of the statements; 63 Cal. 2d at pp. 530-31, 47 Cal. Rptr. at pp. 360-61, 407 P. 2d at pp. 272-273.) This rationale of *Aranda,* to the effect that prejudice should not necessarily follow, accords with decisions of this court as will appear below.

At this juncture it might be asked how intrinsic was the error found in the admission of King's statements. The admission of King's statements and his testimony compelled thereby was adjudged reversible error as to King because the authorities had not advised him of his right to counsel and to remain silent before making statements to the authorities, as required by *People v. Dorado,* 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 (1965), cert. denied, 381 U.S. 937, 946 (1965). (63 Cal. 2d at pp. 699-701, 47 Cal. Rptr. at pp. 914-15, 408 P. 2d at pp. 370-71.) These requirements are now embraced within those articulated by *Miranda v. Arizona,* 384 U.S. 436, 467-473 (1966). However, those requirements were not mandatory as to the states, prior to the date *Miranda* was decided, June 13, 1966. *Johnson v. New Jersey,* 384 U.S. 719, 734 (1966). Accordingly, a reversal as to King was not constitutionally compelled in the present case. In other words, the admission of King's statements and testimony was not aggravated by any intrinsic error.

The basic issue then is as stated in *Delli Paoli v. United States,* 352 U.S. 232, 239 (1957), substituting King's name for Whitley's:

> "The issue here is whether, under all the circumstances, the court's instructions to the jury provided petitioner with sufficient protection so that the admission of Whitley's confession, strictly limited to use against Whitley, constituted reversible error. The determination of this issue turns on whether the instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them."
>
> *Delli Paoli v. United States,* 352 U.S. 232, 239 (1957).

The judgment in *Delli Paoli* was affirmed. The trial court therein gave a limiting instruction when a co-defendant's confession was admitted. Its substance was repeated several times during cross-examination of a government agent before whom the confession was made, and a similar admonition was included in the court's charge to the jury. The admonitions were clear. Among other factors were these: the role of each defendant in the conspiracy was easily understood; each defendant was represented by a separate attorney; a separate trial was not requested; and the particular confession was not introduced til the rest of the government's case was in, rendering it easier for the jury to consider the confession separately.

We urge that such factors were substantially present in the case at bar. The relevant admonitions and instructions were clear and explicit. During the period the testimony of King's extrajudicial statements was presented, the court gave these admonitions:

> "Obviously it wouldn't apply to the defendant Gilbert and whatever is said here, you are to draw absolutely no connection with the defendant Gilbert and disregard it insofar as the defendant Gilbert is concerned." [Rep. Tr. p. 1939.]
>
> ". . . I think, however, at this time, in view of the testimony of this witness, which he hasn't completed as yet, that I should inform you that this testimony is not binding on the defendant Gilbert in any way; it is completely hearsay as far as he is concerned. You are not to draw any inferences whatever from the testimony you have heard from this witness as to anything in connection with the defendant Gilbert." [Rep. Tr. pp. 1967-68.]

"Ladies and gentlemen, I want to admonish you again that all testimony of statements allegedly made by the defendant King are to have no bearing on the case as against the defendant Gilbert and you are not to draw any inferences from that testimony affecting Gilbert in any way. It is hearsay so far as he is concerned and not binding upon him in any way.

I cautioned you about that yesterday and you understand, I am sure, and will heed my admonition in that regard."

* * *

"Whatever affected King, what he said or did is not binding on the defendant Gilbert in any way." [Rep. Tr. p. 2131.]

Further admonitions of said import appear at Reporter's Transcript pages 2292, 2317 and 2764. During King's testimony, the court reiterated that anything said outside the presence of Gilbert was hearsay as to Gilbert. [Rep. Tr. p. 2367.]

In charging the jury at the close of the trial on the guilt phase, the court instructed that:

"Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose, or against any other defendant." [Cl. Tr. p. 73. This instruction was also repeated at the close of the penalty phase; Cl. Tr. p. 195.]

"Where evidence has been received of a statement by one of the defendants after his arrest and

in the absence of his co-defendant, such statement can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against his co-defendant." [Cl. Tr. p. 73.]

"If you find that the crimes charged in the indictment or any of them were committed and if you further find that the defendant, ROBIN CHARLES KING, JR., was an accomplice as defined in these instructions in the commission of those crimes or any of them, then as against the co-defendant, JESSE GILBERT, his testimony must be corroborated as defined herein. Notwithstanding this rule, before you may convict either defendant, you must find that the evidence against him carries the convincing force required by law.

"In weighing the testimony of the defendant, ROBIN CHARLES KING, JR., as against his co-defendant, JESSE GILBERT, you ought to view it with distrust. This does not mean that you may arbitrarily disregard this testimony but you should give it the weight to which you find that it is entitled after examining it with care and caution and in the light of all the evidence in the case." [Cl. Tr. p. 104. The above instruction was also reread to the jury in substance during the course of their deliberations, and the court indicated it would be sent in with them; Rep. Tr. p. 3299-A.]

In light of the admonitions and instructions given herein (the presence of which distinguishes this case from *Anderson v. United States,* 318 U.S. 350, 356-57 (1942), cited by Petitioner), we urge that the fol-

lowing language is appropriate, substituting King's name for Hollifield's:

> ". . . The trial judge here made clear and repeated admonitions to the jury at appropriate times that Hollifield's incriminatory statements were not to be considered in establishing the guilt of the petitioner. To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. There is nothing in this record to call for reversal because of any confusion or injustice arising from the joint trial. . . ."

Opper v. United States, 348 U.S. 84, 95 (1954).

See also,

United States v. Ball, 163 U.S. 662, 672 (1896);

Lutwak v. United States, 344 U.S. 604, 618-19 (1953);

Wong Sun v. United States, 371 U.S. 471, 490 (1963).

A probing precedent in favor of the joint trial as a general rule and against separate trials as a matter of right is found in *United States v. Marchant,* 12 Wheat. (25 U.S.) 480, 484 (1827), wherein Mr. Justice Story wrote for the Court:

> ". . . We have, therefore, in the present case, not merely the absence of any authority in favor of the matter of right, but the course of practice, and the general reasoning deducible from the prerogative of the crown against it; and lastly, a direct au-

thority, in times when the administration of criminal justice was unsuspected, on the very point.

"Such is the substance of the reasons which induce us to decide against the claim as a matter of right. In our opinion, it is a matter of sound discretion, to be exercised by the court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence. . . ." *United States v. Marchant,* 12 Wheat. (25 U.S.), 480, 484 (1827).

We urge, in light of the authorities cited and on principle, that no violation of due process should be found necessarily to arise from a joint trial, relative to the admission of a co-defendant's statements, unless, for example, it shall appear that the trial court abused its discretion in denying a motion for severance or that the court insufficiently admonished the jury to limit incriminating statements of the declarant to his case only, when such statements would be hearsay as to the non-declarant co-defendant.

We submit that *Jackson v. Denno,* 378 U.S. 368, 388-89 (1964), does not require a contrary conclusion. *Jackson* expresses concern with the ability of a jury to evaluate a confession for its voluntariness, and concern with eliminating the risk that a jury might rely on an involuntary confession in determining a defendant's guilt. We submit that these concerns are different from the one herein: whether, in the posture of the case, the trial court's admonitions and instructions were sufficiently clear and explicit to protect Gilbert's rights and insure that the jury could and would appropriately limit King's statements.

In finding that there was no prejudice to Gilbert on the guilt phase from the admission of King's statements and testimony, the California Supreme Court, speaking through Mr. Chief Justice Traynor, stressed the instructions to the jury and the massive evidence of Gilbert's guilt. (63 Cal. 2d at p. 702, 47 Cal. Rptr. at p. 916, 408 P. 2d at p. 372.) [See Statement of the Case, B, (11), summarizing the eye-witness testimony identifying Gilbert as one of the robbers; *i.e.*, Rep. Tr. pp. 48, 202, 286, 455, 548, 778, 871; see also, Statement of the Case, B, (7), summarizing handwriting testimony linking Gilbert to a diagram of the savings and loan area found in a notebook in his apartment, *i.e.*, Rep. Tr. pp. 1858-59, 1861-63, 1890-92, 1922; see also, Rep. Tr. pp. 1414, 1484, 1920, 1928-29.] Relative to the penalty phase of the trial, the California Supreme Court observed that King's statements were not reintroduced nor did he testify, and that the prosecuting attorney did not comment on King's statements or testimony (in question herein) in arguing to the jury. The California Supreme Court also observed that most of the People's evidence at the penalty phase was introduced to show facts in aggravation of Gilbert's penalty, and that in the face of such facts and of the circumstances of the killing of Officer Davis, no prejudice resulted on the penalty phase from the admission of King's statements and testimony. We urge that the Court's rationale is persuasive.

For all the foregoing reasons we urge that no denial of due process resulted as to Gilbert from the admission of King's statements and testimony.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental

> fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. . . ."
>
> *Lisenba v. California,* 314 U.S. 219, 236 (1941).

The acts herein complained of were not of such quality.

II.

The Entry Into the Apartment and Taking of the Photographs Was Proper, Because the Officers Were in Hot Pursuit.

Petitioner Gilbert contends that his conviction stemmed from an unlawful search and seizure in that the officers, acting without a warrant of arrest or search, entered his locked apartment in his absence and took therefrom the envelope of small photographs, a reproduction of one photograph being shown witnesses at the trial and before the grand jury; and that other items were subsequently removed, although search warrants issued. (Brief for Petitioner, Argument, Point IV.)

Petitioner contends that there were no exigent circumstances or any reasonable belief anyone occupied the apartment, which would have justified entry therein.

It will be recalled that the authorities had apprehended one of the robbers, the wounded Weaver, who told them of Gilbert's complicity and indicated where he lived. The information as to Gilbert's address was borne out. [Statement of the Case, B, (3); Rep. Tr. pp. 1172-74, 1176-77, 1180, 1206-10, 1220-21.]

We submit that the authorities had probable cause to apprehend Gilbert (or a confederate) at Gilbert's apartment if Gilbert (or a confederate) should be there.

See:

Thomas v. United States, 281 F. 2d 132, 136 (8th Cir. 1960), cert. denied 364 U.S. 904 (1960).

See also,

Rodgers v. United States, 267 F. 2d 79, 84-89 (9th Cir. 1959);

Payne v. United States, 294 F. 2d 723, 725 (D.C. Cir. 1961), cert. denied 368 U.S. 883 (1961).

The circumstances legally justifying such apprehension for the state offenses in question were to be determined by the trial court, under California law insofar as that law accorded with the Federal Constitution.

Ker v. California, 374 U.S. 23, 32, 37 (1963).

To make an arrest in California, a peace officer may break open the door or window of the house in which the person to be arrested is, or where the officer has reasonable grounds to believe him to be, after demanding admittance and explaining the purpose; however, the demand and explanation are unnecessary if the officer's peril will be increased.

Ker v. California, 374 U.S. 23, 39-41;

People v. Maddox, 46 Cal. 2d 301, 306, 294 P. 2d 6, 9 (1956), cert. denied, 352 U.S. 858 (1956).

Since Gilbert had recently shot an officer and had fled the scene of the shooting still armed, the authorities

were justified in entering the premises where he resided, without demand or explanation, to arrest him if he should be there, or to arrest any confederate of Gilbert's reasonably believed to be in the apartment. We urge further that the authorities had the right to search without a warrant for that which would aid them in identifying and apprehending Gilbert. *Johnson v. United States,* 333 U.S. 10, 14-15 (1948) and *McDonald v. United States,* 335 U.S. 451, 454-56 (1948), reflect by way of comment that a search without a warrant may be justified when the exigencies of the situation make that course imperative (*e.g.*, the officers are responding to an emergency such as where the defendant is fleeing. While in the course of a proper search, the authorities are not required to blind themselves to significant evidence in plain sight.

People v. Roberts, 47 Cal. 2d 374, 380, 303 P. 2d 721, 724 (1956).

See also,

Love v. United States, 170 F. 2d 32, 33-34 (4th Cir. 1948), cert. denied 336 U.S. 912 (1949);

Paper v. United States, 53 F. 2d 184-85 (4th Cir. 1937).

Indeed, to observe what is placed before an officer in full view does not constitute a search.

Ker v. California, supra, 374 U.S. 23, 43.

It will be recalled that while Officer Nixon was in pursuit of the robbers, a man came up to him and told him two men had left a Pontiac and entered an Oldsmobile. Nixon communicated this over the radio. [Statement of the Case, B(1); Rep. Tr. pp. 1076-77,

1082.] He found Weaver wounded in still a third car. [Rep. Tr. pp. 1066, 1068, 1082.] Weaver was taken to the hospital and was seen there as early as 11:30 a.m. by F.B.I. Agent Norton. [Rep. Tr. pp. 32, 1412-15.] Weaver gave information as to Gilbert and the apartment, and Norton relayed it to the F.B.I. office. [Rep. Tr. pp. 1206-08.] Weaver told Norton that no other person was involved, but Norton did not know whether to believe this. In his conversations with his office, the office had indicated the possibility of another person. [Rep. Tr. pp. 1222-23.] F.B.I. Agent Keil arrived at the apartment about 1 p.m. in response to radio directions. The manager informed him that one of the occupants, Mr. Flood (Gilbert), had just left saying he was going to San Francisco. F.B.I. Agents Schlatter and Onsgard who had arrived were given the key. [Rep. Tr. pp. 1124, 1177-80.] Schlatter learned over the radio, en route to the apartment, that three persons were apparently involved, *i.e.*, the two men in the bank and a third in the getaway; that one of the three was wounded and had wrecked a car and that the other two had gotten away in another car. On arrival, Schlatter talked to Keil and received information that one of the occupants had just left. [Rep. Tr. pp. 1246-48.]

Mrs. Willner accompanied the F.B.I. agents to the apartment. She recalled that they told her to stand clear to a place of safety. [Rep. Tr. pp. 1165-66.] When Schlatter obtained the key to the apartment, his state of mind was as follows: The F.B.I. knew from information previously received that there were three robbers, that one was wounded and accounted for, that one had left just a few minutes before and that a third

one was unaccounted for and presumably in the apartment; it was also in his mind that one of the robbers had shot a police officer. [Rep. Tr. p. 1249.] When he took the key and started toward the particular apartment, his intention was as follows: the officers were going into a place where presumably a man was who had just participated in a bank robbery, and it was the intention of the officers to take him into custody; it was very much in his mind that the man might be armed; and he believed himself to be in hot pursuit of an individual in that apartment. [Rep. Tr. p. 1250.] He also thought it possible that Gilbert had told the landlady he was going to San Francisco, as a ruse, and that he might then be in the apartment or more possibly return in a half-hour. [Rep. Tr. p. 1281.] The officers searched for a person or a hiding place for a person, inside the apartment. They went into closets and looked under beds. In doing this, one or more officers saw several objects of manifest significance in open view including a notebook with a diagram of the savings and loan area, an Alpha Beta markets paper sack found to contain rolls of coins with the markings of the savings and loan, a clip from a .45 automatic, and photographs. [Rep. Tr. pp. 1250-58, 1301-03, 1305-08, 1320, 1336, 1370.]

More particularly, as to the photographs (which Petitioner stresses), F.B.I. Agent Crowley observed a small envelope lying on top of a dresser. The envelope had the name of a photo studio on it. It appeared to and did in fact contain photos, including People's Exhibit 46. [Rep. Tr. pp. 1182, 1437-38.] They were passport type photos, and were copies. People's 46 was compared with a "mug shot"; the group discussed the circum-

stance that it was of Gilbert. Crowley gave them to Schlatter; there were three or four. Schlatter told Keil to take them to the savings and loan and see if anyone there could recognize the person. Keil took them there and gave them to F.B.I. Agent La Jeunesse. [Rep. Tr. pp. 1181-83, 1255-56, 1259-60, 1266, 1301-03.] The latter had People's Exhibit 46 enlarged and reproduced and shown the witnesses. [Rep. Tr. pp. 1287-92, 1298.]

In light of the circumstances, we submit that the officers were justified in entering the apartment and taking the photographs without a search warrant. Except for the photographs, the objects were taken in connection with the issuance of search warrants. [Rep. Tr. pp. 1358-61, 1378-79, 1398-1402, 1482. The fingerprint lifts in the apartment were taken following the first search warrant; Rep. Tr. pp. 1310, 1329, 1343-44, 1633.]

We submit further that these statements of the trial judge are appropriate:

> ". . . [I]t is obvious that in investigations of this kind time is of the essence. There isn't any question in the Court's mind that at the time of the first entry here that these officers were, as the term is used, in hot pursuit of what I think reasonably would be considered a very good lead. One of the participants in the robbery had identified and linked the defendant Gilbert with the offense, and gave enough information that he was located, his place was located, the apartment was located within a matter of minutes, almost. In fact, they were in hot pursuit in a matter of seconds, almost. They were present on the premises

of this location and the defendant Gilbert was apparently present there when the first F.B.I. Agent arrived, so that is how hot the pursuit was.

"They had information at that time that there were probably three persons involved, and one of them for certain had been located, in the hospital, and they had reasonable ground to believe that they had located the second one; and a third one was still at large. And I think they would certainly be derelict in their duties if they walked away from this place to take an hour, or whatever it takes, to get a search warrant.

"I think they were definitely in hot pursuit at that time, and I think they were fully armed and went into the apartment with the idea of looking for someone, the third party, possibly. And, as indicated by one of the officers who testified, they had no assurance that Gilbert had left the premises, although he indicated that he was going to San Francisco. They are not bound by that. They don't have to take his word for that. That may be a ruse in order to throw whoever might be coming after them off scent. That is one of the possibilities.

"I think the first entry was perfectly legal. . . ." [Rep. Tr. pp. 1406-08.]

The California Supreme Court pertinently observed that

"'. . . the officers were in fresh pursuit of two robbers who escaped in the same automobile, ...The officers entered, not to make a general exploratory search to find evidence of guilt, but in fresh pursuit to search for a suspect and make an arrest.

A police officer had been shot, one suspect was escaping, and another suspect was likely to escape. Under these circumstances the officers were not required to demand entrance and announce their purpose . . ., for to do so might have alerted the suspect and increased the officers' peril. . . .

"The search in the present case is thus different from the search condemned in Stoner v. California, 376 U.S. 483. . . . In that case, two days after the robbery of a food market, police officers identified the defendant as one of the two robbers. Without a warrant, the officers went to the defendant's hotel where a clerk let them into his room. They had no reason to believe that the defendant was in his room, for his key was in his mailbox at the hotel desk. The officers were not in fresh pursuit of escaping robbers, and they therefore had no reason to believe that the accomplice was in defendant's room. Moreover, they had time to obtain a warrant. Accordingly, there were no exigent circumstances such as existed in the present case to justify the search.

"The search in the present case was also properly limited to and incident to the purpose of the officers' entry. While the officers were looking through the apartment for their suspect they could properly examine suspicious objects in plain sight. . . . Moreover, they could properly look through the apartment for anything that could be used to identify the suspects or to expedite the pursuit. Accordingly, the evidence obtained through the search was properly admitted." 63 Cal. 2d at p. 707, 47 Cal. Rptr. at p. 919, 408 P. 2d at p. 375.

The course followed by the authorities herein in entering Gilbert's apartment and taking the photographs is reminiscent of the obligations assumed in England, under the common law, by the conservators of the peace, who had

> ". . . authority to arrest felons and persons whom they had reasonable grounds to believe were perpetrators of a felony. Whenever a charge of felony was brought to their notice, supported by reasonable grounds of suspicion, they were required to apprehend the offenders, or at least to raise a hue and cry, under penalty of being indicted for neglect of duty. The right to dispense with warrants in these instances probably had its origin in the necessity of preventing the escape of offenders during the period of delay incident to procuring warrants if such formality had been required."
>
> 4 Anderson, Wharton's Crim. Law and Proc., Section 1595, page 242.

See also,

> 4 Blackstone, Commentaries on the Laws of England, pages 293-94 (Jones Ed., 1916, Vol. 2, Section 330, pages 2516-17.)

Reminiscent of hue and cry, *Caldwell v. United States,* 338 F. 2d 385 (8th Cir. 1964), cert. denied, 380 U.S. 984 (1965), deals with fresh pursuit following a bank robbery and taking into custody an object that will assist with identification. We believe that the circumstances therein are sufficiently analogous to those in the case at bar, and the reasoning of the court sufficiently persuasive to warrant our quoting,

at some length, the following excerpts from the court's opinion, at page 387:

"When the pursuing bank employees found the robber's getaway car, the keys were in the ignition and the overcoat in question was partly inside and partly outside the closed car door. FBI Agent Buckley was instructed to investigate the car and its contents. He arrived at the location of its abandonment approximately thirty minutes after the robbery. Agent Buckley, without a warrant, searched the car, removed the coat, and then transferred the car to a government garage within less than an hour after the bank was robbed and several hours before the defendant was apprehended and his identity confirmed by witnesses.

"The constitutional rights against illegal search and seizure as guaranteed by the Fourth Amendment must be zealously protected. However, it sometimes poses a difficult problem to determine whether these individual rights have been infringed or whether under the circumstances, the police have conducted a fair and reasonable investigation within constitutional bounds.

". . .

"In the instant case the suspected robber was still at large at the time of the alleged illegal search and capable of removing his escape vehicle across the nearby state line outside the jurisdiction of local authorities. The federal agents removed the overcoat and had the car towed to a government garage for further investigation in order to facilitate identity and apprehension of the escaping felon.

"Only those searches and seizures without a warrant that are deemed unreasonable fall within the Fourth Amendment's prohibition. . . . The expediency of the events following the crime justified the investigating officers' confiscation of the felon's clothing and car in order to swiftly determine his identity and thereby effectuate his capture before he could make good his escape or destroy other evidence of the crime."

Caldwell v. United States, supra, 338 F. 2d 385, 387.

(The court noted as a reason for holding the Fourth Amendment inapplicable, the circumstance that the coat was not discovered in a search nor taken by a seizure in the legal sense of the terms, *i.e.* the coat was found in plain sight abandoned in a public place. This, however, was articulated in terms of a further reason. Page 338.)

See also,

Gilbert v. United States, ... F. 2d .... (9th Cir.. Sept. 16, 1966, No. 19940; slip opinion, pp. 5-13).

In our case the authorities had received a lead from the wounded Weaver to the effect that his fleeing accomplice was Gilbert. The search for Gilbert or a confederate in Gilbert's apartment disclosed the envelope of photographs which were compared by the authorities with a "mug shot." The photographs, like the overcoat in *Caldwell,* were properly taken to assist in identification. A reproduction of one of the photographs, exhibited to witnesses that day at the savings and loan, could very well confirm or disprove the va-

lidity of Weaver's lead and point the direction in which the authorities should concentrate their energies to apprehend the escaped robber and killer. Clearly, time was of the essence, and its pressure justified the authorities entering the apartment and taking the photographs.

We urge, in any event, that there was no denial of a fair trial; in other words, no ". . . failure to observe that fundamental fairness essential to the very concept of justice. . . ." *Lisenba v. California*, 314 U.S. 219, 236 (1941).

Fairness was evident in the way photographs were displayed to the witnesses. Generally, photographs were shown in groups, and the authorities did not single out a particular picture and say to the witness, "This is the man who did it; do you identify him?" [Statement of the Case, *supra*, B(11); *e.g.*, Rep. Tr. p. 145.]

As militating against any prejudice, we refer to the substantial and impressive in-court identification testimony. (Statement of the Case, *supra*, B(11).)

It was not the photographs which caused the witnesses in question to materialize. Their being witnesses stemmed from their having been present at the scene of the offenses. Even if there had been some invalidity in the use of the photographs, we submit that the in-court identifications of these witnesses would be untainted. As Mr. Justice Holmes stated for the court in *Silverthorne Lumber Company v. United States*, 251 U.S. 385, 392 (1920), relative to the exclusionary rule:

> ". . . Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others. . . ."

See also,

Costello v. United States, 365 U.S. 265, 280 (1961).

The following language in *Smith v. United States,* 324 F. 2d 879, 881-882 (D.C. Cir. 1963), cert. denied 377 U.S. 954 (1964), is persuasive, by analogy:

"Courts have gone a long way in suppressing evidence but no case as yet has held that a jury should be denied the testimony of an eyewitness to a crime because of the circumstances in which his existence and identity was learned. However, in our view, the relationship between the inadmissible confessions and Holman's testimony in the District Court months later is so attenuated that there is no rational basis for excluding it. . . .

". . . .

"[A] witness is not an inanimate object which like contraband narcotics, a pistol or stolen goods, 'speak for themselves.' The proffer of a living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. The fact that the name of a potential witness is disclosed to police is of no evidentiary significance, per se, since the living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence."

Smith v. United States, supra, 324 F. 2d 879, 881-882.

(In footnote 3, p. 882, the court distinguished *Wong Sun v. United States*, 371 U.S. 471 (1963) as a case not involving the suppression of eyewitness testimony.)

In other words, the crucial evidence was the in-court identification, not a prior showing to a witness of a photograph asserted to be improperly obtained. As the trial judge remarked, relative to one of the eyewitnesses, "I would think, if I were in the robbery she was in, I would think I would have a pretty good idea who did it when I saw him in the courtroom, and I think she has." [Rep. Tr. p. 194.]

For the foregoing reasons, we submit that the actions of the authorities with respect to entering the apartment were proper, that the photographs were properly taken following said entry to assist with identification, that what the officers observed in open view justified their later taking other objects in connection with the issuance of search warrants, and that in no event is any fundamental unfairness disclosed.

III.

The Right to Counsel Did Not Apply to the Lineup, There Being No Violation of the Privilege Against Self-Incrimination.

Petitioner Gilbert complains that he was taken to a lineup and compelled to appear before witnesses, subsequent to the indictment, without notice, and that his counsel was not given an opportunity to be present, contrary to his right to the assistance of counsel. (Brief for Petitioner, Argument, Point II.)

As a corollary contention, he argues that there appeared no order authorizing his release from the County Jail for the purpose of being in the lineup. However,

as the California Supreme Court observed, the People were not required to establish such authorization as a foundation for the testimony of the witnesses who identified Gilbert; further, it was presumed official duty was regularly performed, and there was no compelling reason to adopt an exclusionary rule to enforce compliance with a statute relative to custody of prisoners in jail. (63 Cal. 2d at p. 708, 47 Cal. Rptr. at p. 920, 408 P. 2d at p. 376, footnote 7.)

Petitioner argues that the procedures followed herein, being post-indictment, were vulnerable under *Massiah v. United States,* 377 U.S. 201 (1964). If they were vulnerable under *Massiah,* then they were also vulnerable under *Escobedo v. Illinois,* 378 U.S. 478 (1964). *Escobedo* reflects (pp. 484-85) that if there has in fact been a denial of the right to the assistance of counsel, it is no less a denial because it occurs before rather than after the indictment. Petitioner's argument therefore presents for consideration, as our initial inquiry, the intrinsic nature of the lineup. Since *Escobedo* (378 U.S. at p. 484) and *Massiah* (377 U.S. at p. 206) concern the applicability of constitutional guaranties when a defendant's own incriminating words are used against him at the trial, is a lineup, such as the one in the case at bar, synonymous with the use of a defendant's own incriminating words?

Smith v. United States, 187 F. 2d 192 (D.C. Cir. 1950), cert. denied 341 U.S. 927 (1951), reflects a negative answer. In determining there was no viola-

tion therein of the privilege against self-incrimination, the court at page 198 quoted the following language from *Ross v. State,* 204 Ind. 281, 291-292, 182 N.E. 865, 868 (1932):

> "'. . . We do not think that the rule against compulsory self-incrimination properly applies to pretrial efforts to identify a suspect as the probable perpetrator of a crime even though these efforts involve physical examination or observation of the suspect against his will. . . .'"

8 Wigmore, *Evidence,* Sections 2263, 2265, pages 378, 386 (McNaughton rev. 1961), states that the privilege against self-incrimination, historically, was directed at the employment of legal process to extract from a person's own lips an admission of guilt, and that "Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

Schmerber v. California, 384 U.S. 757, 763-764 (1966) states:

> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd v. United States,* 116 U.S. 616. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or *speak* for

identification, to appear in court, to stand, *to assume a stance, to walk,* or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it.

"Although we agree that this distinction is a helpful framework for analysis, we are not to be understood to agree with past applications in all instances. There will be many cases in which such a distinction is not readily drawn. Some tests seemingly directed to obtain 'physical evidence,' for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. . . ." (Emphasis added.)

Schmerber v. California, 384 U.S. 757, 763-764.

We submit that a lineup such as the one involved in the case at bar (Statement of the Case, B, (11)), is not directed to "eliciting responses which are essentially testimonial."

Of the seven witnesses who identified Gilbert during the guilt phase as one of the robbers, Miss Butler [Rep. Tr. p. 142], Mrs. Riddle [Rep. Tr. p. 349], and Mr. Clark [Rep. Tr. p. 566], related having attended the lineup. Petitioner notes that Mrs. Willner, who rented the apartment to Gilbert, was also at the lineup [Rep. Tr. pp. 1140, 1168]; however, like the eye-witnesses who identified Gilbert as one of the robbers, her initial identification testimony pertained to Gilbert in the courtroom. [Rep. Tr. pp. 1123-24.] The eight witnesses

who identified Gilbert as a participant in other robberies, during the penalty phase, related having attended the lineup [Rep. Tr. pp. 3330, 3358, 3376, 3472, 3509, 3549, 3745, 3757.]

Gilbert was indicted March 10, 1964. At the time, he had not been returned from Philadelphia. It appears that he was returned March 16. [Cl. Tr. p. 1; Rep. Tr. pp. 1676, 1682, 1696-97.] Counsel was appointed the day of his arraignment March 18, and new counsel was substituted in on March 24. [Cl. Tr. pp. 13-14.] The lineup took place March 26. [Rep. Tr. pp. 2197-98.] (Plea was entered April 16, following disposition of a motion. [Cl. Tr. p. 17.]) We submit that the lineup was not held an undue time after Gilbert's availability in California. That the lineup procedure was eminently fair is reflected in the following testimony.

Miss Butler related that she went to the police building around 7 p.m. March 26; she was in an auditorium; there could have been a hundred people in the auditorium; she would say that eight or ten Caucasian men were brought in in a line; questions were asked them and when they were asked to speak or answer they would be required to step forward [Rep. Tr. pp. 142-43, 147-50]; some were asked when or where he was arrested and did he own an automobile; some were asked to describe the automobile; Gilbert was in the lineup [Rep. Tr. pp. 150-52]; the men were on a stage; the lighting was bright on the stage and dark in the audience; light was reflecting into the eyes of those in the lineup, it would have been very difficult for them to look out into the audience [Rep. Tr. p. 152]; a moderator asked the questions [Rep. Tr. pp. 156-57]; the men all left the stage together [Rep. Tr. p. 161]; no one

told Miss Butler whom to identify of the group; she did not remember that the men were asked to identify themselves by name nor did she recall Gilbert mentioned by name. [Rep. Tr. pp. 183-84, 188.]

Mr. Clark related that he saw about ten men at the lineup; he did not do anything before he went in the police building, nor go any place before he entered the auditorium; the auditorium was darkened and light shone on the people on the stage [Rep. Tr. pp. 566, 568]; the men on stage would be asked by an officer or moderator questions of this nature: "When were you arrested?" "Do you own an automobile?" "What is the make of your automobile?" [Rep. Tr. p. 571.] Mr. Clark further testified that the men in the lineup were Caucasians; there were differences in ages and clothing of those he remembered; as he recalled Gilbert was No. 7; as to whether any person removed any clothing, he recalled that one man, possibly No. 5, removed a jacket. [Rep. Tr. pp. 572-75, 577-78.]

It is evident from the foregoing that the participants in the lineup were not required to do anything more than exhibit themselves and talk for identification.[2]

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[2]From our perusal of the record it does not appear that the men in the lineup were asked to speak beyond the tenor of the matter reflected in the excerpts above. However, the opinion in *Gilbert v. United States*, ... F. 2d .... (9th Cir., Sept. 16, 1966, No. 19940) is indicative of further matter. *Gilbert v. United States, supra,* concerns a federal prosecution for four bank robberies, not including the Mutual Savings and Loan Association in Alhambra. The same lineup as herein involved is discussed. (Slip opinion, pp. 15-16, 30; see also, pp. 43-44, dissent.) The court notes evidence to the effect that the men were asked where they lived and whether they were armed when arrested, and that they were asked to repeat, in a soft and in a loud voice, certain phrases which witnesses heard the robbers use; also that they were required to put on or remove certain articles of clothing;

(This footnote is continued on the next page)

They were not required to incriminate themselves. This being the case, the right to the assistance of counsel did not inhere. Said right is basically designed to safeguard the individual's privilege against self-incrimination. As stated in *Escobedo v. Illinois*, 378 U.S. 478, 488-(1964):

> ". . . Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. . . ."

See also,

Schmerber v. California, 384 U.S. 757, 765-766.

A persuasive parallel to the situation in the case at bar is presented by *People v. Lopez*, 60 Cal. 2d 223, 32 Cal. Rptr. 424, 384 P. 2d 16, cert. denied 375 U.S. 994 (1964). In *Lopez* the defendants argued that they were prejudiced because the police did not allow their counsel to attend a show-up or line-up at which certain witnesses to the particular robbery identified them. The line-up related to the case at issue and others. It was urged that the procedure deprived them of their right to coun-

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that Gilbert and several others remained for a period; and that the witnesses called out in one another's presence the numbers of the men they could identify. We submit that such further circumstances do not detract from our argument. While petitioner might contend that more cooperation was required from him personally in speaking the particular phrases than in any other respect, and that in effect he was representing the use of his normal voice, still he was not required to do anything testimonial that was used against him at the trial. Assuredly, his voice was an essential physical characteristic. It follows that he was doing no more nor less than offering himself for personal notice when he repeated phrases that did not impart what he knew about the events at the Mutual Savings and Loan. We urge then that even under the additional circumstances reflected by *Gilbert v. United States, supra*, the lineup herein was designed fundamentally for purpose of identification, not incrimination.

sel at all stages of the proceedings, and that the privilege against self-incrimination was infringed. The lineup occurred after the filing of the complaint and after the arraignment, but before the preliminary examination. It was held in an auditorium in which the audience had a clear view of the stage but in which some screening made it difficult for those on stage to see the audience. The persons in the lineup would sometimes speak in response to questions of the officer in charge; both defendants spoke. There was no direct oral communication between suspects and spectators. (60 Cal. 2d at p. 241, 32 Cal. Rptr. at p. 434, 384 P. 2d at p. 26.)

The court indicated that the rights of an accused to counsel in the pretrial stages were granted principally to insure early representation and adequate trial preparation, and that they should not be construed in a way that would hamper legitimate investigation by the police when no substantial right of an accused was involved.

The court went on to observe:

> ". . . We do not believe that the accused has a right to have counsel present during purely investigatory activities which are not designed to elicit information from the accused or otherwise impinge upon his constitutional rights. The subject show-up was designed to aid the police with identification of the more robbers whoever they might be, with the elimination of persons possibly mistakenly suspected, and with the selection of witnesses; it was not intended to elicit information from the defendants or to have them do anything that would destroy their privilege against self-incrimination. There was no denial of due process in

refusing counsel's request to attend this show-up. The competency of the eye-witnesses of the more robbery to testify at the trial was not affected by their observation of defendants at the show-up without the attendance of defendants' counsel.

"Lopez's specific contention that during the show-up defendants' privilege against self-incrimination was violated is manifestly untenable. There is no indication, on the record before us, that defendants made or were asked to make any statements that would tend to incriminate them. The privilege extends only to testimonial compulsion; requiring defendants to assume a certain pose for purposes of identification, or to speak for voice identification, is not within the privilege. . . . Even in the courtroom during trial a defendant may be required to stand and remove a visor so that witnesses attempting to identify him (or, presumptively exonerate him) may have an unobstructed view of his features. . . ."

People v. Lopez, 60 Cal. 2d 223, 243-44, 32 Cal. Rptr. 424, 435-436, 384 P. 2d 16, 27-28.

Taking note of its holding in *Lopez,* the California Supreme Court in the case at bar said:

". . . Since the privilege against self-incrimination does not exempt the accused from appearing for the purpose of identification, no substantial right is infringed by the show-up. The principle of the *Lopez* case has not been impaired by Escobedo v. Illinois, 378 U.S. 478. Although requiring a defendant to appear in a show-up after his indictment cannot be considered a mere investiga-

tory procedure, the defendant is not prejudiced by the absence of counsel so long as the show-up is not designed to elicit information from him or impair his privilege against self-incrimination. . . ." (63 Cal. 2d at p. 709, 47 Cal. Rptr. at p. 920, 408 P. 2d at p. 376.)

See also *Kennedy v. United States,* 353 F. 2d 462 (D.C. Cir. 1965), wherein it was said at page 466:

". . . The absence of counsel at the time of the confrontation at the scene of the crime did not deprive Appellant of a right to silence, a right to withhold evidence or any other right which could have been effectively asserted had counsel been present."

See also,

Williams v. United States, 345 F. 2d 733, 734 (D.C. Cir. 1965), cert. denied 382 U.S. 962 (1965);

Gilbert v. United States, ... F. 2d ..... (9th Cir. Sept. 16, 1966, No. 19940) (slip opinion pp. 13-34).

Petitioner refers to *Wade v. United States,* 358 F. 2d 557, 558-60 (5th Cir. 1966), cert. granted, 35 U.S.L. Week. 3124 (U.S. Oct. 10, 1966) (No. 334). It was held therein that a lineup in the absence of counsel was vulnerable, and that the evidence of the identification witnesses "following the occurrence that we have held to have violated Wade's rights" must be omitted at a retrial. (In *Wade* it appeared that the lineup took place as long as six months after the occurrence, and the defendant was seen separately by the witnesses alone before the lineup.) *Wade* is contrary to the position

we urge based on cases such as *Lopez*. It may be noted that the *Wade* holding was predicated (358 F. 2d at p. 559) on the views of the dissenting judges in *United States ex rel. Stovall v. Denno*, 355 F. 2d 731 (1996), cert. granted, 384 U.S. 1000 (June 20, 1966) (No. 1565, Misc., 1965 Term; renumbered No. 254, 1966 Term (35 U.S.L. Week 3050).) The dissenting judges in *Stovall* (*i.e.*, 355 F. 2d at p. 745, first dissenting opinion) would merely have required the exclusion of evidence as to out-of-court identification, in a retrial; they would not have prohibited the particular witness from making an in-court identification. The majority opinion in *Stovall* accords with the authority on which we rely. While the *Wade* court indicated (358 F. 2d at p. 560) that if counsel was present he could caution the accused to remain silent, the court in *Stovall* indicated (355 F. 2d at p. 739) that counsel could not prevent the police from proceeding with identification activities. As was observed in the concurring opinion in *Stovall*, footnote 1, page 740:

> ". . . Only when police conduct threatens to violate a personal right of the defendant that retains vitality during detention—e.g., the privilege against self-incrimination—or when police practices unfairly prevent the defense attorney from preparing his case—a literal deprivation of the right to counsel—must a court interfere to guarantee that the right is properly preserved. . . ."

By way of obviating any prejudice, what was said in *Payne v. United States*, 294 F. 2d 723, 727 (D.C. Cir. 1961), cert. denied, 368 U.S. 883 (1961), is pertinent:

> ". . . The consequence of accepting appellant's contention in the present situation would be that

> Warren would be forever precluded from testifying against Payne in court, merely because he had complied with the request of the police that he come to police headquarters and had there identified Payne as the robber. Such a result is unthinkable. The suppression of the testimony of the complaining witness is not the right way to control the conduct of the police, or to advance the administration of justice. The rights of the accused in a case like the present are adequately protected when the complaining witness takes the stand in open court, for examination and cross-examination. . . ."

While in *Payne* the point in issue was an illegal detention rather than the absence of counsel, we submit that the language quoted above applies by analogy. Also noteworthy is the following language from the concurring opinion in *Williams v. United States,* 345 F. 2d 733, 736 (D.C. Cir. 1965):

> ". . . Even if the line-up in the instant case, while appellant was without counsel, is somehow to be construed into a 'primary illegality' under Escobedo, we would be unable to find a causal nexus between the line-up and the subsequent testimony; and such a connection is necessary for exclusion. . . ."

For the foregoing reasons we urge that the right to counsel did not apply to the lineup. In any event, considering the abundant evidence of guilt including the courtroom identification testimony, we urge that fundamental fairness was preserved.

IV.

Gilbert's Right to Counsel Was Not Violated by His Giving Handwriting Exemplars, Since There Was No Violation of His Privilege Against Self-Incrimination.

It is urged that petitioner Gilbert was denied the right to the assistance of counsel in that handwriting exemplars were taken from him after a prior request for the presence of counsel, and in effect that he should have been first warned the exemplars could be used against him in the trial in California. (Br. for Petitioner, Argument, Point III.)

Before we turn to the factual background, some general observations with respect to handwriting exemplars appear appropriate.

We urge that if a handwriting exemplar is voluntarily given, constitutional requirements are met. The right to the assistance of counsel is basically designed to safeguard the individual's privilege against self-incrimination. Again, as stated in *Escobedo v. Illinois*, 378 U.S. 478, 488 (1964):

> ". . . Our Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination. . . ."

See also,

Schmerber v. California, 384 U.S. 757, 765-766 (1966).

If the giving of handwriting exemplars is outside the privilege against self-incrimination, then there is no requirement for the assistance of counsel, nor as a consequence for the cautions required since the decision in

Miranda v. Arizona, 384 U.S. 436, 467-473 (1966). In *Schmerber v. California, supra*, at pp. 763-764, the court said, relative to the privilege against self-incrimination, that it reaches communications of an accused in whatever form, and the compulsion of responses that are also communications:

> ". . . On the other hand, both federal and state courts have usually held that it offers no protection against compulsion . . . to *write* . . . for identification, . . ." (Emphasis added; p. 764, *id.*)

The court in *Schmerber* noted the emergence of a distinction, that the privilege is a bar against compelling testimony or communications but not as to making the accused the source of real or physical evidence. The distinction was characterized as a "helpful framework for analysis," but the court indicated it was not necesarily in agreement with all past applications thereof, referring to lie detector tests which may be directed toward eliciting essentially testimonial responses.

In conjunction with our belief that we are not herein dealing with eliciting testimonial responses, may we call attention to McCormick on Evidence, Section 126, pages 263-65 (1954), wherein the author takes note of the view that the privilege protects only testimonial compulsion in the sense of giving testimony and of producing documents and other objects in court; and that in jurisdictions following this view the privilege is not violated when the accused is, *inter alia*, required to give a specimen of his handwriting. The author observes, ". . . This view most nearly achieves the aim of holding the privilege within limits which will enable law enforcement officers to perform their tasks without unreasonable obstruction." *Id.* p. 265.

We submit that the following language in *People v. Harper,* 115 Cal. App. 2d 776, 779, 252 P. 2d 950, 952, presents a persuasive rationale for viewing handwriting exemplars as outside the privilege against self-incrimination:

> ". . . Defendants rely upon the privilege against self-incrimination contained in the Constitution of California (art. I, § 13) and in the Fifth Amendment to the Constitution of the United States. Defendants, however, do not come within the protection of those constitutional guaranties since they only protect a person from any unwilling testimonial disclosures, and do not preclude the introduction of physical evidence that a defendant is induced to provide, such as an exemplar of his handwriting. The protection extends only to communications, oral or written, upon which reliance is placed as involving a defendant's consciousness of the facts and the operation of his mind in expressing them. There was no 'testimonial compulsion' here. Defendants were not required to verify the authenticity of their handwriting on the exemplars. This was provided by a witness who saw them fill out the exemplars. Defendants were not compelled to disclose that the writing on the betting markers was theirs. This was proved by a handwriting expert. There is here no reliance to be placed upon any statement made by either of the defendants. The evidence was their handwriting, a physical fact which was compared with the handwriting on the betting markers and found to be the same. . . ."
>
> *People v. Harper,* 115 Cal. App. 2d 776, 779, 252 P. 2d 950, 952.

Harper is cited in footnote 4, *Bryant v. United States,* 244 F. 2d 411, 412 (5th Cir. 1957), relative to assuming ". . . the doubtful proposition that taking a specimen of handwriting from appellant can be the basis of a valid claim that she was compelled to be a witness against herself. . . ." The court in *Bryant* concluded that it was not essential to the admissibility of handwriting specimens that the defendant should have been first warned that they might be used against her in a criminal case, provided the specimens were voluntarily and understandingly furnished.

We urge that they were so furnished by Gilbert in the case at bar. The essential facts, together with the conclusions of the California Supreme Court, are reflected in the following excerpt from the court's opinion, with references to the Reporter's Transcript inserted in brackets by respondent:

> "He contends that handwriting exemplars were obtained from him by deceit and in the absence of counsel in violation of the principles of Escobedo v. Illinois, 378 U.S. 478, and that the exemplars were erroneously admitted at the trial along with testimony based upon them by an expert who identified Gilbert's handwriting on the bank area drawing found in his apartment. Since we agree with the Attorney General's contention that Gilbert waived any rights that he might have had before he made the exemplars, we need not decide whether handwriting exemplars are properly within the rule of Escobedo v. Illinois, supra. We also agree that there is no evidence of improper deception by the authorities.

"F.B.I. Agent Dean arrested Gilbert in Philadelphia on February 26, 1964. When Dean attempted to interrogate Gilbert about the Alhambra bank robbery, Gilbert refused to talk until he obtained the advice of counsel. [Rep. Tr. pp. 1548-51, 1577-78, 1675, 1860.] Later that day, agent Shanahan interviewed Gilbert. Shanahan told him that he was not required to say anything without advice from an attorney and that any statement he made might be used against him. [Rep. Tr. pp. 1823-24, 1830, 1836.] Gilbert agreed to talk about anything except the California robbery. Shanahan interrogated Gilbert about robberies in Philadelphia in which a demand note had been used and he asked Gilbert for a sample of his handprinting. Gilbert voluntarily wrote some exemplars. [Rep. Tr. pp. 1830-32, 1833-34, 1836-37.] Shanahan testified that he obtained those exemplars for the purpose of investigating the Philadelphia robberies and that they were thereafter filed by the F.B.I. in the same manner as fingerprints. He did not tell Gilbert that the exemplars would not be used in any other investigation. [Rep. Tr. pp. 1830-32, 1835, 1839.] Thus, even if Gilbert believed that his exemplars would not be used in California, it does not appear that the authorities improperly induced such belief." (63 Cal. 2d at p. 708, 47 Cal. Rptr. at p. 920, 408 P. 2d at p. 376.)

In a subsequent decision, *People v. Graves*, 64 A.C. 216, 49 Cal. Rptr. 386, 411 P. 2d 114 (1966), cert. denied, 35 U.S. L. Week. 3129 (U.S. Oct. 10, 1966) (No. 464, Misc.), (cited in footnote 8, *Schmerber v. California*, 384 U.S. 757, 764), the California Su-

preme Court determined that the right to counsel during police interrogation established in *Escobedo v. Illinois,* 378 U.S. 478, does not protect a defendant from revealing evidence against himself by giving handwriting exemplars. The court pertinently said:

> "In *Escobedo,* the court found a remedy in the Sixth Amendment right to counsel for the abuses it deemed inherent in inquisitorial methods. There is nothing in the language or the logic of *Escobedo,* however, to indicate that this remedy is needed if the police have not carried out a process of interrogation that lends itself to eliciting incriminating statements. Accordingly, we find no support in *Escobedo* for invoking the right to counsel to block scientific crime investigation. Reliance on handwriting exemplars for expert analysis is not a substitute for thorough scientific investigation of crime but an excellent example of such investigation. To preclude the police from asking for such exemplars would foster reliance instead on the very inquisitorial methods of law enforcement that *Escobedo* deems suspect." (64 A.C. at pp. 218-219, 49 Cal. Rptr. at pp. 387-388, 411 P. 2d at 115-116.)

The court in footnote 2 called attention to this language in the Report of the President's Commission on the Assassination of President Kennedy, pages 567-68 (1964):

> "Handwriting identification is based upon the principle that every person's handwriting is distinctive. . . . The possibility that one person could imitate the handwriting of another and successfully deceive an expert document examiner is very remote."

Since a specimen of handwriting is real or physical evidence outside the privilege against self-incrimination, since the right to counsel does not apply to giving a handwriting specimen, and since additionally the handwriting specimens in question were given without coercion, Gilbert's constitutional guaranties were not infringed.

In light of petitioner's argument relative to fundamental fairness, we submit these further observations. It is of course true that Gilbert's giving the exemplars required a certain measure of cooperation from him, yet no more surely than was required in his stepping forward or speaking for identification at the lineup. In other words, he was simply participating in identification procedures. He was not asked if he would copy the matter that appeared on the diagram found in the notebook in his apartment, for the inquiry concerned demand notes in Philadelphia. In his own testimony on the issue of admissibility (outside the presence of the jury), Gilbert said that he told Shanahan he did not wish to talk about robberies on the West Coast unless he had counsel present, but that he would be glad to cooperate if the matter only involved Philadelphia, since he did not want someone who was guilty to get away. [Rep. Tr. pp. 1843-1844.] Shanahan himself testified that he had no information the exemplars were to be used susbsequently in Los Angeles. [Rep. Tr. pp. 1833-1834.] It was F.B.I. policy, however, to secure

samples of hand printing of all suspects in bank robberies to compare with samples on file in Washington. The samples were kept for further reference; it was in the same category as taking fingerprints and keeping the fingerprints on file. [Rep. Tr. p. 1839.] It is evident from the circumstances heretofore summarized that Gilbert voluntarily and understandingly agreed to talk with Shanahan, that Shanahan talked with Gilbert in good faith and that Shanahan employed no subterfuge or coercion in procuring the exemplars. It is submitted that the F.B.I. policy relative to exemplars is a salutary one nationally. We urge then that the exemplars were no more immune from use in the case at bar than an utterance by Gilbert in the course of his conversation with Shanahan had that utterance proved relevant to this case. Thus, there is shown no conduct on the part of the authorities which offends the conscience nor infringes any right or privilege the accused is entitled to assert.

In any event, considering the massive evidence against Gilbert [*e.g.*, eye-witness testimony, Statement of the Case, B(11); see also, evidence that a handwriting specimen in Gilbert's name (Peo. Ex. 75), other than those in question, was also used in comparison; Statement of the Case, B(7); Rep. Tr. pp. 1861-63, 1874, 1878-83, 1890-92, 2346], we urge that fundamental fairness prevailed.

Conclusion.

Since no unfairness resulted as to Gilbert from the admission of King's statements and testimony, since the entry into the apartment and taking of photographs and other items was proper, and since the right to counsel did not apply to the lineup nor to the giving of handwriting exemplars, it is requested that the judgments of conviction as to Gilbert, pending before this Honorable Court, be affirmed.

Respectfully submitted.

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